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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

Nos. 198, 199

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
APPELLANT,

vs.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC
ACCOUNTS, ET AL.

Nos. 200, 201

PANHANDLE EASTERN PIPE LINE COMPANY,
APPELLANT,

vs.

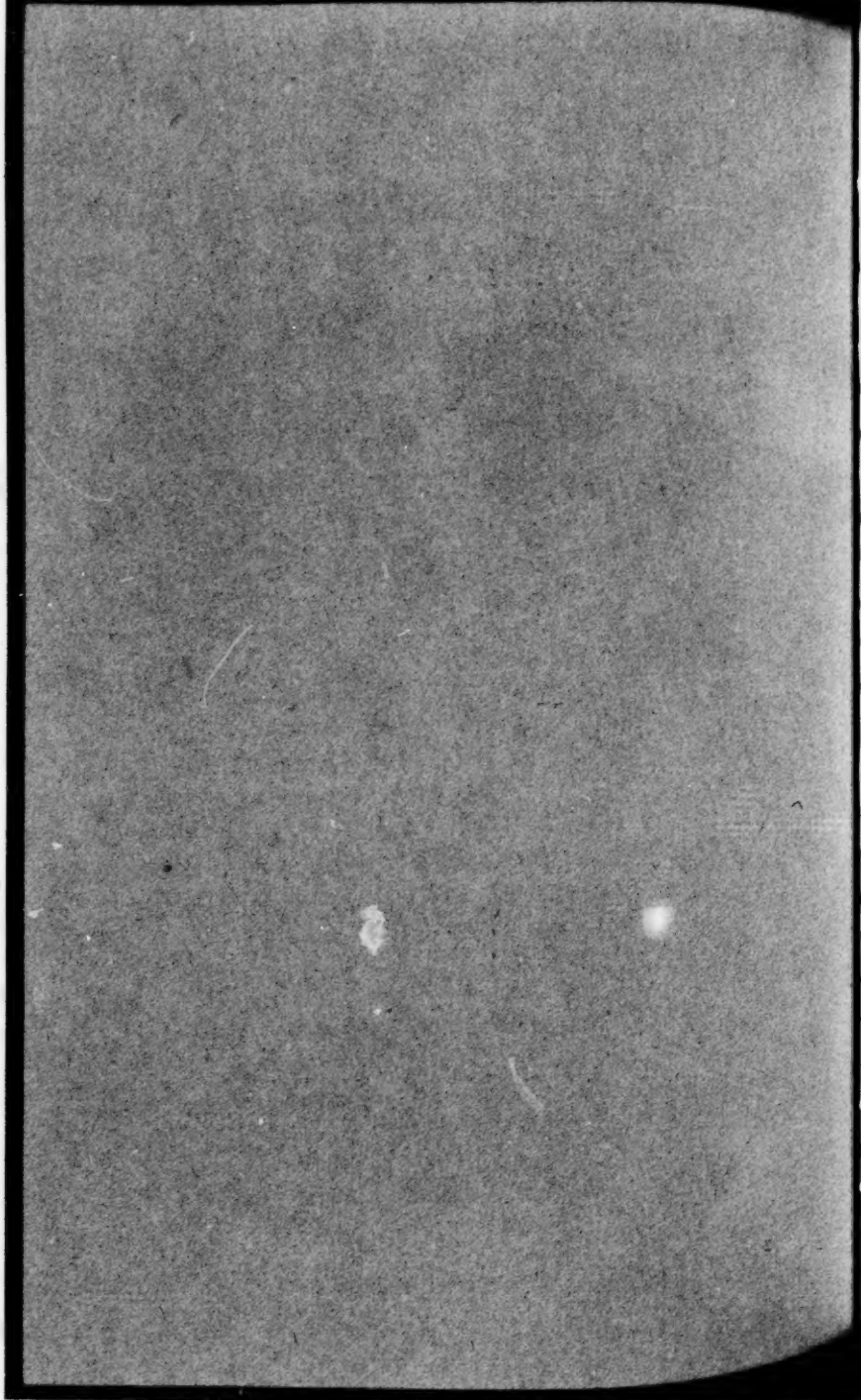
ROBERT S. CALVERT, COMPTROLLER OF PUBLIC
ACCOUNTS, ET AL.

No. 198 & No. 200—APPEALS FROM THE COURT OF CIVIL
APPEALS OF TEXAS, THIRD SUPREME JUDICIAL DISTRICT

No. 199 & No. 201—APPEALS FROM THE SUPREME COURT OF
THE STATE OF TEXAS

FILED JULY 22, 1963

Jurisdiction postponed October 12, 1963



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[fol. 1]

**IN THE 126TH DISTRICT COURT OF TRAVIS COUNTY,
TEXAS**

MICHIGAN-WISCONSIN PIPE LINE COMPANY

v.

ROBERT S. CALVERT, et al.

**PLAINTIFF'S FOURTH AMENDED ORIGINAL PETITION—Filed
July 29, 1952**

To Such Honorable Court:

Michigan-Wisconsin Pipe Line Company, herein called plaintiff, files its Fourth Amended Original Petition against Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, Price Daniel, Attorney General of the State of Texas, and Jesse James, State Treasurer of the State of Texas, defendants herein, and for cause of action shows:

I

Plaintiff is a corporation, incorporated under the laws of the State of Delaware. Defendant Robert S. Calvert is Comptroller of Public Accounts of the State of Texas; defendant Price Daniel is Attorney General of the State of Texas; and defendant Jesse James is State Treasurer of the State of Texas. All of such defendants are sued in their official capacities in accordance with the provisions of V. A. C. S. 7057b, being the Acts of the 43rd Legislature of Texas, Chapter 214, as amended.

II

This suit is brought under said V. A. C. S. 7057b (being the Acts of the 43rd Legislature of Texas, Chapter 214, as amended) for a determination that Section XXIII of H. B. 285, Chapter 402, page 740, Acts of the 52nd Legislature of the State of Texas, effective September 1, 1951, is invalid on its face and as interpreted by defendants, insofar as it applies to plaintiff's operations, and for the recovery of moneys heretofore paid under protest by plaintiff and [fol. 2] moneys that will be so paid during the pendency of

1—198-201

this suit under the requirements of defendant Robert S. Calvert, plus interest thereon as provided in said V. A. C. S. 7057b.

III

Plaintiff is a natural gas company within the definition of that term contained in the Natural Gas Act of 1938, as amended, and holds certificates of convenience and necessity under which it is authorized to transport in interstate commerce and to sell in interstate commerce gas received into its line for such transportation and sale. All of its activities in the State of Texas are in interstate commerce.

Plaintiff sells no gas in Texas. It owns and operates a gas pipeline system, consisting principally of a 24- and 22-inch pipeline with 16 compressor stations, one of which is leased, (utilizing 156,980 H. P.), and other necessary facilities. The system originates at a point in Hansford County, Texas, about one-fourth of one mile south of the boundary between Texas and Oklahoma and extends therefrom in a general northeasterly direction to termini at the Austin Gas Storage Field near Big Rapids, Michigan, and at a point near Green Bay, Wisconsin. The delivery capacity of such pipeline is approximately 303 million cubic feet of gas daily, depending upon temperature conditions as between the winter and summer months. The customers of plaintiff include 16 gas distribution companies serving markets in Missouri, Iowa, Wisconsin and Michigan. The principal cities served are Detroit, Ann Arbor, Grand Rapids and Muskegon, Michigan and Milwaukee, Madison, Sheboygan, Racine and Green Bay, Wisconsin. The total population of the consuming markets for which this company supplies gas is estimated at about 5,000,000 persons.

[fol. 3]

V

Plaintiff produces no gas, in Texas or elsewhere. It gathers no gas (within the real meaning of that term as it is consistently used in the gas industry and in ordinary usage, as distinguished from the unrealistic, arbitrary and erroneous definition contained in H. B. 285) in Texas or elsewhere. Its supply for its markets is residue gas, which gas is purchased by plaintiff from Phillips Petroleum Company near the outlet of the Phillips gasoline plant located

in Hansford County, Texas, near the boundary line between Texas and Oklahoma and immediately adjacent to the field compressor station of plaintiff; and upon such purchase such gas goes immediately and directly from the outlet of such Phillips gasoline plant into plaintiff's facilities for transportation to its markets, all of which are in states other than Texas.

VI

The gas so purchased by plaintiff from Phillips is the residue from natural gas produced by Phillips or purchased by it from other producers in either the Texas portion or the Oklahoma portion of the Hugaton Field, approximately 93% being produced in Texas and approximately 7% being produced in Oklahoma. After such natural gas is produced, whether by Phillips or by other producers, it is gathered by Phillips through an extensive gathering system covering many wells both in Texas and in Oklahoma. A portion of such gas, when produced or purchased and gathered by Phillips, contains sulphur or sulphur compounds which are removed by Phillips through a desulphurization process in order that the objectionable sulphur content may be removed therefrom. All of such natural gas, when produced and gathered, contains gasoline and other hydrocarbons extractable in liquid form. Before such residue gas is purchased by plaintiff from Phillips, such natural gas is processed through Phillips' gasoline plant in Hansford County, Texas, where such liquid hydrocarbons are extracted. After such desulphurization and such extraction of liquids, the residue gas is sold by Phillips to plaintiff for immediate transportation to plaintiff's markets. The title to such residue gas passes to plaintiff at a meter located adjacent to the outlet of such gasoline plant.

VII

The residue gas so purchased by plaintiff is delivered by Phillips from its gasoline plant directly into plaintiff's facilities for immediate transportation in interstate commerce to points in other states. The movement of such gas from the point of delivery to plaintiff near the outlet of the Phillips gasoline plant through this company's gas pipeline system to plaintiff's customers in Iowa, Missouri, Michi-

gan and Wisconsin, is a movement of such gas, with no break, no period of deliberation, but a steady flow, ending, as contemplated from the beginning, at points far beyond the Texas state line. The purchase of such gas by plaintiff from Phillips is a purchase in interstate commerce, and the taking of possession by plaintiff of such residue gas near the outlet of the Phillips gasoline plant is accomplished solely through the use of facilities that are dedicated by plaintiff exclusively to interstate commerce.

VIII

As a matter of fact, even before such residue gas enters plaintiff's facilities, it has been committed to its interstate journey, which follows without interruption or deviation. There is not only a certainty of destination outside the State of Texas from the time such residue gas enters such [fol. 5] facilities, but at all times during the actual gathering by Phillips of the natural gas of which such residue gas is a constituent and during the time of the extraction of the sulphur and the liquid hydrocarbons from such natural gas, the residue gas constituent is already committed to sale and delivery to plaintiff for such interstate journey, and there is already a certainty of destination thereof outside of the State of Texas.

IX

The gross volumes of gas (in MCF) so taken (within the meaning of such Section XXIII) by plaintiff near the outlet of such Phillips gasoline plant since such H. B. 285 became effective and reportable hereto were as follows:

During the month of September, 1951 . . .	9,671,551
During the month of October, 1951	10,321,143
During the month of November, 1951 . . .	9,734,873
During the month of December, 1951	9,645,287
During the month of January, 1952	10,056,880
During the month of February, 1952	9,683,708
During the month of March, 1953	9,983,549
During the month of April, 1952	8,431,368
During the month of May, 1952	10,314,753
During the month of June, 1952	9,538,589

X

If such Section XXIII of H. B. 285, on its face or as interpreted by defendants, can lawfully be applied to plaintiff's operations in so taking such gas as above set forth, then plaintiff is required by such Section XXIII to pay a tax of 9/20 of 1¢ per thousand cubic feet for the gas so taken (except such gas as is excluded under the provisions of such section) as an occupation tax for the privilege of so taking such gas.

[fol. 6] Of the gas so taken by plaintiff, as aforesaid, plaintiff in determining the quantity of gas for purposes of calculating the tax has excluded gas used for fuel in connection with lease or filed operations. The quantities of gas so excluded under the express provisions of the Act follow:

September, 1951	220,243 MCF
October, 1951	236,104 MCF
November, 1951	215,785 MCF
December, 1951	216,932 MCF
January, 1952	220,660 MCF
February, 1952	212,455 MCF
March, 1952	216,501 MCF
April, 1952	187,803 MCF
May, 1952	221,259 MCF
June, 1952	206,439 MCF

The net volumes of taxable gas and the taxes payable for each such period, after making the aforesaid exclusions, follows:

<i>Month</i>	<i>MCF</i>	<i>Tax Payable</i>
September, 1951	9,451,308	\$42,530.89
October, 1951	10,085,039	45,382.68
November, 1951	9,519,088	42,835.90
December, 1951	9,428,355	24,247.60
January, 1952	9,836,220	44,262.99
February, 1952	9,471,253	42,620.64
March, 1952	9,767,048	43,951.72
April, 1952	8,243,565	37,096.04
May, 1952	10,093,494	45,420.72
June, 1952	9,332,150	41,994.68

[fol. 7]

XI

For each of the aforesaid periods within the time permitted by the Act, plaintiff filed with defendant Robert S. Calvert, Comptroller of Public Accounts of the State of Texas a report on the form prescribed by that public official showing the volumes of gas so taken by plaintiff during the respective periods, and, at the same time, plaintiff paid to such official the respective sums shown in the foregoing Paragraph X. Such reports were filed and such payments were made as follows:

For the month of September, 1951, on October 24, 1951.

For the month of October, 1951, on November 23, 1951.

And for each succeeding month on or before the 25th of the following month.

XII

Each of the aforesaid payments so made was paid by plaintiff under duress in order,—

- (1) To avoid liability for penalties and interest;
- (2) To prevent the filing of suit by the Attorney General against the plaintiff for an injunction;
- (3) To prevent the fixation of a lien on plaintiff's properties and a suit for foreclosure of such lien; and
- (4) To avoid the expense of an audit, all of which are authorized by the Act in the event of nonpayment of the tax if such Act is valid as applied to the operations of plaintiff.

In accordance with the provisions of V. A. C. S. 7057b (Acts of 43rd Legislature of Texas, Chapter 214, as amended) plaintiff, for each of the periods aforesaid and within the time permitted by law, at the time of filing its [fol. 8] such reports and paying to the Comptroller its formal written protest in which plaintiff set out fully and in detail the grounds and reasons why plaintiff contends that such tax and the demands for payment thereof under the interpretation thereof, are unlawful and unauthorized.

XIII

Plaintiff is informed and believes that defendant Robert S. Calvert, as Comptroller, in accordance with such V. A. C. S. 7057b, has transmitted to defendant Jesse

James, State Treasurer of Texas, the sums of money received from plaintiff as set forth in numbered Paragraph XI hereof and informed such Treasurer in writing that such money was paid under protest; and such Treasurer has in all things complied, as to such payments, with the provisions of V. A. C. S. 7057b, applicable thereto.

XIV

The provisions of section XXIII of such H. B. 285, as to such taking of gas by plaintiff and the tax sought to be imposed on plaintiff with respect thereto, are unlawful and unconstitutional and the Comptroller of Public Accounts of the State of Texas is not lawfully entitled to demand or collect such tax on the following grounds, all of which were fully and in detail set out in the written protests filed with such Comptroller as set forth in Subdivision XII hereof, to-wit:

1. As applied to the residue gas of which plaintiff "takes" possession near the outlet of Phillips gasoline plant, such so-called "gathering tax" imposed under H. B. 285 is an attempt by the state to levy a tax on the purchase of gas for immediate transportation in interstate commerce, on the privilege of purchasing gas in interstate commerce, on the entry of gas into interstate commerce, and on the activity or occupation of engaging in interstate commerce. Such tax, therefore, is violative of Subdivision 3 of Section 8 of Article I (the commerce clause) of the Constitution of the United States.

[fol. 9] 2. While denominated a "gathering tax" the tax provided for in Section XXIII of H. B. 285 is not, in fact, a tax upon the exercise of the function of gathering gas, as that term is consistently used generally and in the gas industry, but it is one, as applied to the operations of plaintiff, upon the act of taking gas into interstate commerce. Such tax is, therefore, violative of Subdivision 3 of Section 8 of Article 1 (the commerce clause) of the Constitution of the United States.

3. The so-called "gathering tax" imposed by Section XXIII of H. B. 285 is violative of Subdivision 3 of Section 8 of Article 1 (the commerce clause) of the Constitution of

the United States as applied to the operations of plaintiff in that it is levied upon a movement of goods in interstate commerce during the course of such commerce, and is a tax upon the privilege of transporting goods in interstate commerce.

4. As applied to the residue gas so taken and purchased by plaintiff from Phillips, such tax is not imposed on the one who really gathers gas, either natural or residue, as that term is consistently used generally and in the gas industry. Plaintiff has no part in the gathering of such natural gas and owns no part of the facilities by which such gas is, in fact, gathered. The imposition of such tax upon plaintiff is therefore violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States and of the due process section (Article 1, Sec. 19) of the Constitution of the State of Texas.

5. The requirement of such Section XXIII of H. B. 285 that plaintiff pay a gathering tax on the residue which it purchases from Phillips, as aforesaid, is unreasonable, arbitrary and violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States and of the due process section of the Constitution of the State of Texas (Article 1, Section 19), since such gas is not gathered, in fact, by plaintiff and plaintiff performs no function with respect to the gathering of such gas.

[fol. 10] 6. Such Section XXIII of H. B. 285 is vague, indefinite, unintelligible and incapable of uniform application. It is therefore violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States and of the due process section (Article 1, Section 19) of the Constitution of the State of Texas.

XV

During the pendency of this suit additional monthly reports will be filed by plaintiff with such Comptroller dealing with gas similarly taken by plaintiff subsequent to the periods above set forth. Payments of the tax due thereon by plaintiff for the gas so taken shown from such reports will be made at the time of such filing, and the payments so made will be accompanied by formal protest similar to those heretofore filed, as stated in Paragraph XII hereof; and

thereupon appropriate amended petitions will be filed dealing with such subsequent payments as authorized by such V. A. C. S. 7057b, as amended.

XVI

Ninety days did not elapse after the date of any such payment of taxes and the filing of such protest before the filing of suit by this plaintiff for the recovery thereof.

XVII

For the reasons hereinabove and in such protests set out fully and in detail, the tax imposed on plaintiff under such Section XXIII of H. B. 285 is unlawful and unconstitutional as to plaintiff; and the defendant Robert S. Calvert, State Comptroller, is not lawfully entitled to demand or collect the same; and this plaintiff is entitled to recover the sums so paid, together with the interest thereon, as is provided by Section 6 of such V. A. C. S. 7057b, as amended.

[fol. 11] Wherefore, premises considered, plaintiff prays that, on hearing, plaintiff have a judgment decreeing that the tax imposed by such Section XXIII of H. B. 285 cannot be lawfully applied to the operations of plaintiff as set out herein, and that such tax is, as to plaintiff, unlawful and unconstitutional as aforesaid, and that the Comptroller of Public Accounts of the State of Texas is not lawfully entitled to demand or collect the same from plaintiff; that the court find that the sums of money so paid by plaintiff under duress and under protest, together with the interest earned thereon, should be returned to plaintiff under appropriate orders; and that plaintiff have such other relief, legal or equitable, as it may show itself entitled to receive.

Respectfully submitted, Culton, Morgan, Britain & White, Barfield Building, Amarillo, Texas; Looney, Clark & Moorhead, Brown Building, Austin, Texas; Sidley, Austin, Burgess & Smith, 11 South LaSalle Street, Chicago, Illinois; S. A. L. Morgan, Houston, Texas, Attorneys for Plaintiff.

(S.) Everett Looney, of Counsel.

[File endorsement omitted.]

[fol. 12] IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS,
126TH JUDICIAL DISTRICT

MICHIGAN-WISCONSIN PIPE LINE COMPANY

v.

ROBERT S. CALVERT, Comptroller of Public Accounts, et al.

DEFENDANTS' FIRST AMENDED ORIGINAL ANSWER—Filed
May 12, 1952

Now come Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, Jesse James, State Treasurer of the State of Texas, and Price Daniel, Attorney General of the State of Texas, defendants in the above entitled and numbered cause, and for their first amended original answer to plaintiff's original petition, in lieu of their original answer heretofore filed herein, would show to the Court as follows:

I

Defendants deny each and every allegations contained in plaintiff's original petition.

II

Defendants specially deny each and every allegation contained in Paragraph XXV of plaintiff's first amended original petition and allege that the tax levied and imposed by Section XXIII of H. B. 285, Acts 52nd Leg., 1951, is a tax levied upon any person engaged in the occupation of first taking or first retaining possession of gas produced in Texas for a transmission through a pipeline or otherwise after severance of such gas within the State of Texas, and as such is an occupation tax upon such persons engaged in such occupation within the State of Texas, which bears a direct relationship to the opportunities, benefits, or protection conferred by the Constitution and laws of the State [fol. 13] of Texas upon the persons engaging in the occupation so taxed. The occupation tax so levied and imposed is equal and uniform as applied to all persons engaged in such business or occupation, whether in interstate commerce or intrastate commerce, and does not impose an undue burden upon or discriminate against any person engaged

in such occupation or business in interstate commerce within the meaning of the Commerce Clause of the Constitution of the United States.

Wherefore, defendants pray that upon hearing hereof they recover judgment that plaintiff take nothing by its suit, and that they recover all costs in this behalf expended.

Price Daniel, Attorney General of Texas; W. V. Gephert, Assistant Attorney General; E. Wayne Thode, Assistant Attorney General; (S.) C. K. Richards, Assistant Attorney General, Attorneys for Defendants, Capitol Station, Austin, Texas.

[File endorsement omitted.]

[fol. 14] IN THE 126TH DISTRICT COURT OF TRAVIS COUNTY,
TEXAS

PANHANDLE EASTERN PIPE LINE COMPANY

v.

ROBERT S. CALVERT, et al.

PLAINTIFF'S FOURTH AMENDED ORIGINAL PETITION—Filed
July 29, 1952

To Such Honorable Court:

Panhandle Eastern Pipe Line Company, herein sometimes referred to as plaintiff and sometimes as Panhandle, files its Fourth Amended Original Petition against Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, Price Daniel, Attorney General of the State of Texas, and Jesse James, State Treasurer of the State of Texas, defendants herein; and for cause of action shows:

I

Plaintiff is a corporation, incorporated under the laws of the State of Delaware. Defendant Robert S. Calvert is comptroller of Public Accounts of the State of Texas; defendant Price Daniel is Attorney General of the State of

Texas; and defendant Jesse James is State Treasurer of the State of Texas. Defendants are sued in their respective official capacities in accordance with the provisions of V. A. C. S. 7057b, Acts of the 43rd Legislature of Texas, Chapter 214, as amended.

II

This suit is brought under said V. A. C. S. 7057b (Acts of the 43rd Legislature of Texas, Chapter 214, as amended) for a determination of the invalidity, as applied to plaintiff's operations, of Section XXIII of H. B. 285, Chapter 402, page 740, Acts of the 52nd Legislature of the State of Texas, effective September 1, 1951, as such Section XXIII is interpreted by defendants, or *an* in any manner interpreted, and for the recovery of moneys heretofore paid under protest by plaintiff and moneys that will be so paid [fol. 15] during the pendency of this suit, on demand of defendant Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, the public official charged with the duty of collecting such tax, as taxes due and payable by plaintiff under such Section XXIII.

III

Panhandle is incorporated under the laws of the State of Delaware. It is a natural gas company within the definition of that term contained in the Natural Gas Act of 1938, as amended, and holds certificates of convenience and necessity issued by the Federal Power Commission under which it is authorized to transport in interstate commerce and sell in interstate commerce gas received into its line for such transportation and sale.

Except for a sale of gas from its gathering line for carbon black manufacture and certain other sales of small volumes of gas from such gathering line hereinafter referred to, and except for certain inconsequential sales along its interstate

IV

pipeline transportation system hereinafter referred to, Panhandle sells no gas in Texas. Other than the sales above referred to, its southermost sale is at Kismet, Kansas. It owns and operates (except for a distance of approximately 70 miles which is a single line only) a dual or triple natural

gas pipeline system consisting principally of 20", 22", 24", 26" and 30" pipeline, with 18 compressor stations, utilizing approximately 288,600 horse power and other necessary facilities.

V

Panhandle's main pipeline originates at what is generally referred to as Panhandle's Sneed Compressor Station (south of which it has certain gathering lines hereinafter referred to), near the east boundary of Moore County, Texas, and extends therefrom through the states of Texas, Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio and has its northern termini in the State of Michigan. The designed sales capacity of Panhandle's system, as constructed, is approximately 850 million cubic feet of gas daily, varying slightly with temperature conditions as between winter and summer months and seasonal demands. The principal markets served by Panhandle include gas distribution companies and industrial consumers in the states referred to. The total population of the consuming markets to which gas is supplied by Panhandle is estimated at approximately 7½ million people.

VI

To provide a portion of the gas required for Panhandle's markets, it owns gas leases covering approximately 43,584 acres of land in the Panhandle Field of Texas, which leases are in Carson, Hutchinson, Moore and Potter Counties. On these leases it has 76 producing gas wells. The gas required for such markets, over and above that which is produced from Panhandle's such wells is, in part purchased from other producers in Texas, Oklahoma and Kansas, and, in part, produced from Panhandle's wells in Oklahoma and Kansas.

VII

Panhandle also owns a system of gathering lines for the purpose of collecting natural gas produced from its wells and natural gas acquired from other producers of gas in the Panhandle Field. This system consists of two arms, the North Field arm and the South Field arm. One section of the North Field arm, into which the natural gas from 20

wells is so collected, is operationally disconnected from the rest of the system and all the gas which is collected in that [fol. 17] section is delivered by Panhandle therefrom to Continental Carbon Company for carbon black manufacture. Panhandle also delivers from the main system of gathering lines to the Skelly School in Moore County an average of approximately 6 MCF daily and to E. B. Dulaney in Moore County approximately 23 MCF daily.

VIII

The volumes of natural gas collected by Panhandle through such gathering system (including the natural gas produced from Panhandle's wells and the natural gas acquired from other producers) which is not required for the sales referred to in the preceding paragraph is taken by Panhandle from both arms of such gathering system into Panhandle's Sneed Compressor Station where such natural gas is compressed. From such compressor station it passes into a gasoline plant owned and operated by Phillips Petroleum Company, which is located adjacent to Panhandle's Sneed Compressor Station.

IX

The natural gas which thus passes into Panhandle's compressor station contains, when produced, substantial quantities of gasoline and other extractable liquid hydrocarbons and, under contract between Panhandle and Phillips, such natural gas is processed by Phillips in such gasoline plant for the removal of such liquid hydrocarbons and the residue gas therefrom is taken at the outlet of such gasoline plant directly into Panhandle's main line for immediate transportation in interstate commerce to Panhandle's customers in states other than Texas.

X

In addition to the residue gas from the natural gas which goes from Panhandle's gathering system into Panhandle's compressor station at Sneed, Panhandle also acquires and [fol. 18] rakes into its main line for transportation to its markets outside the State of Texas residue gas from three

other sources. All of such gas so acquired is residue from natural gas which, when produced, contains substantial quantities of gasoline and other hydrocarbons extractable in liquid form, and such natural gas is processed in gasoline plants in Texas for removal of such liquid hydrocarbons before the residue gas is received into Panhandle's main pipeline. The details as to such sources of residue gas are set forth in the next succeeding paragraphs herein.

XI

Phillips Petroleum Company (Phillips) produces and purchases natural gas in Texas and collects such gas through its gathering system and delivers a portion thereof into Panhandle's Sneed Compressor Station where such gas, along with the natural gas which enters such compressor station from Panhandle's gathering system is compressed. After such compression, the commingled gas passes into Phillips' gasoline plant near Panhandle's such Sneed Compressor Station. After the liquid hydrocarbons are so removed in such gasoline plant of Phillips, the residue gas from such commingled gas passes into Panhandle's main line, at or near the outlet of Phillips' gasoline plant.

XII

Panhandle also purchases from Skelly Oil Company at the outlet of such Phillips gasoline plant at Sneed approximately 10 million cubic feet daily of residue gas. The natural gas of which such gas is originally a constituent is delivered through Panhandle's gathering and compressing facilities into the Phillips gasoline plant, and Panhandle "takes" such residue within the meaning of H. B. 285 at the outlet of such gasoline plant.

[fol. 19]

XIII

Approximately 210 million cubic feet of gas (at 14.65 p. s. i.) ordinarily pass into Panhandle's main line daily at such outlet of the Phillips gasoline plant. Of this, approximately 70% is the residue from the natural gas which belongs to Panhandle when it passes into Panhandle's compressor station, and approximately 30% represents the

residue from the natural gas belonging to Phillips and Skelly which passes into such compressor station and which is purchased by Panhandle from Phillips and Skelly, respectively. Such 70% is gas of which possession is "retained" by Panhandle and such 30% is gas of which possession is "taken" by Panhandle at the outlet of such gasoline plant within the meaning of such Section XXIII of H. B. 285.

XIV

Panhandle purchases from Shamrock Oil and Gas Company (Shamrock) and from Magnolia Petroleum Company an aggregate of approximately 100 million cubic feet daily of residue gas at the outlet of Shamrock's McKee gasoline plant in Moore County, Texas. The natural gas, of which such residue gas is originally a constituent, is produced in Texas and contains, when produced, a substantial quantity of gasoline and other hydrocarbons extractable in liquid form, and such gas is processed through such McKee Gasoline Plant in Texas for the removal thereof. The residue gas so received by Panhandle at the outlet of such gasoline plant is "taken" by Panhandle (as that word is used in H. B. 285) at such outlet and is then transported to Panhandle's main pipeline through Panhandle's 18-inch line and enters such main pipeline at a point east of Panhandle's Hansford Compressor Station in Hansford County, Texas.

[fol. 20]

XV

Panhandle purchases from Phillips Petroleum Company approximately 95 million cubic feet daily (14.65 p. s. k.) of residue gas at the outlet of Phillips' Hansford gasoline plant in Hansford County, Texas. Of the natural gas of which such residue gas is originally a constituent, approximately 40% to 45% is produced in Texas and approximately 55% to 60% is produced in Oklahoma. All of such gas contains, when produced, substantial quantities of gasoline and other liquefiable hydrocarbons which are extracted at said Hansford gasoline plant. Such approximately 40% to 45% of the residue gas so purchased by Panhandle at the outlet of such Hansford gasoline plant is "taken" by Panhandle within the meaning of the word as used in H. B. 285. The

gas so purchased by Panhandle from Phillips at the outlet of such Hansford Plant is delivered through Panhandle's 18-inch line into Panhandle's Hansford Compressor Station and thence into Panhandle's main pipeline to markets outside the State of Texas.

XVI

The gross volumes of gas (in MCF) so "retained" and so "taken" by Panhandle during the months of September, October, November and December, 1951, and January, February, March, April, May and June, 1952, were as follows:

(Here follows 1 paster, side folios. 21-22)

[fols. 21-22]

SOURCE	September	October	November	December
(1) Gas "retained" by Panhandle at outlet of Phillips' Gasoline Plant at Sneed	4,543,792	4,958,535	4,839,450	5,039,244
(2) Gas "taken" by Panhandle at outlet of Phillips' Gasoline Plant at Sneed	1,923,730	1,811,330	2,047,484	2,149,302
(3) Gas "taken" by Panhandle at outlet of Phillips' Hansford Gasoline Plant	1,294,630	1,384,521	954,576	852,964
(4) Gas "taken" by Panhandle at outlet of Shamrock's McKee Plant	3,071,737	3,184,239	3,097,690	3,381,786
(5) Gas "retained" by Panhandle and delivered by Panhandle from its facilities to Continental Carbon Company for carbon black manufacture in Texas	648,127	685,438	711,587	727,525
(6) Gas "retained" by Panhandle and delivered to J. T. Sneed Estate by Panhandle from its facilities	9	38	124	153
(7) Gas "retained" by Panhandle and delivered by Panhandle from its facilities to Skelly School	52	130	271	36
(8) Gas "retained" by Panhandle and delivered by Panhandle from its facilities to E. B. Dulaney	78	90	156	206
TOTAL	11,482,155	12,024,321	11,651,338	12,151,211

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[fol. 23]

XVII

If such Section XXIII of H. B. 285, as interpreted by defendants, or as in any other manner interpreted, can lawfully be applied to plaintiff's operations in so taking and so retaining such gas as above set forth, then plaintiff is required by such Section XXIII to pay a tax of 9/20 of 1¢ per thousand cubic feet for the gas so taken and so retained (except such gas is excluded under the provisions of such section) as an occupation tax for the privilege of so taking and so retaining such gas.

Of the gas so taken and the gas so retained by plaintiff, as aforesaid, plaintiff in determining the quantity of gas for purposes of calculating the tax has excluded gas used for fuel in connection with lease or field operations and gas sold for carbon black manufacture. The quantities of gas so excluded under the express provisions of the Act follows:

September, 1951	813,189 MCF
October, 1951	873,335 MCF
November, 1951	945,490 MCF
December, 1951	947,901 MCF
January, 1952	879,835 MCF
February, 1952	820,828 MCF
March, 1952	960,531 MCF
April, 1952	930,844 MCF
May, 1952	762,566 MCF
June, 1952	892,648 MCF

The net volumes of taxable gas and the taxes payable for each such period, after taking the aforesaid exclusions, follow:

Month	MCF	Tax Payable
September, 1951	10,668,966	\$48,010.35
October, 1951	11,150,986	\$50,179.44
November, 1951	10,705,848	\$48,176.32
December, 1951	11,203,314	\$50,414.91
January, 1952	12,095,346	\$54,429.06
February, 1952	11,161,445	\$50,226.50
March, 1952	12,006,123	\$54,027.55
April, 1952	10,989,726	\$49,453.76
May, 1952	6,945,642	\$31,255.29
June, 1952	10,811,930	\$48,653.68

[fol. 24]

XVIII

As set forth in Paragraph IV hereof, Panhandle makes sales of small volumes of residue gas from the streams of gas "taken" and "retained" at the outlets of the Sneed Gasoline Plant of Phillips, the Hansford gasoline plant of Phillips, and the McKee gasoline plant of Shamrock to purchasers, delivered off its main line, as follows:

(1) To Southwestern Public Service Company, for distribution in Gruver, Texas, an approximate daily average of 123.28 MCF during the year;

(2) To three taps for gas used in irrigation daily average during the year of 17.7 MCF;

(3) To New Hope School in Hansford County, Texas, a daily average during the year of 5 MCF;

(4) To farm taps (a part of the consideration for rights of way), a daily average during the year of 4.82 MCF.

The total volumes of gas so sold in Texas from such main line, aggregating 146.3 MCF daily, represents only 36/100 and only 46/100 of 1% of the residue from Texas produced gas which is so taken and received into such main line daily. The sales from such main line in Texas are therefore inconsequential.

XIX

The remainder of the residue gas so taken and retained by Panhandle (except the small amounts used by Panhandle in company operations to the movement of such gas) flows through Panhandle's main pipe line system to Panhandle's customers in states other than Texas—with no break, no period of deliberation, but a steady flow, as contemplated from the beginning, and ending at points in other states far beyond the Texas state line. Before any of such residue [fol. 25] gas so "retained" and so "taken" at the outlets of such three gasoline plants enters Panhandle's main line, such gas has been committed to its interstate journey which follows without interruption or deviation; and there is a certainty of destination outside the state from the very time such residue gas enters into Panhandle's such main line facilities.

XX

At the very time natural gas enters into that portion of Panhandle's gathering facilities, which is not connected to the delivery of gas to Continental Carbon Company for carbon black manufacture, all the residue constitute of such natural gas (except from the natural gas delivered to E. B. Dulaney, Skelly School, as set forth in Subdivision 16 hereof, and the gas used in field operations of Panhandle, and the gas delivered to J. T. Sneed Estate as a royalty obligation, is committed to its interstate journey, which follows without interruption or deviation; and there is a certainty of destination outside the state from the very time such gas enters Panhandle's gathering facilities.

XXI

The "retaining" of possession by Panhandle at the outlet of the Phillips Sneed gasoline plant and the "taking" of possession by Panhandle at the outlets of the Phillips Sneed gasoline plant, the Phillips Hansford gasoline plant, and the Shamrock McKee gasoline plant represent merely the use of facilities that are dedicated (except for the incidental and inconsequential sales referred to in Subdivision 19 hereof) by Panhandle solely to interstate commerce.

XXII

For each of the aforesaid periods within the time permitted by the Act, plaintiff filed with defendant Robert S. Calvert, Comptroller of Public Accounts of the State of [fol. 26] Texas a report on the form prescribed by what public official showing the volumes of gas so taken and so retained by plaintiff during the respective periods, and, at the same time, plaintiff paid to such official the respective sums shown in the foregoing Paragraph XVII. Such reports were filed and such payments were made as follows:

For the month of September, 1951, on October 24, 1951.

For the month of October, 1951, on November 23, 1951.

And for subsequent months on or before the 25th of the following month.

XXIII

Each of the aforesaid payments so made was paid by plaintiff under duress in order,

- (1) To avoid liability for penalties and interest;
- (2) To prevent the filing of suit by the Attorney General against the plaintiff for an injunction;
- (3) To prevent the fixation of a lien on plaintiff's properties and a suit for foreclosure of such lien; and
- (4) To avoid the expense of an audit, all of which is authorized by the Act in the event such Act is valid as applied to the operations of plaintiff.

In accordance with the provisions of V. A. C. S. 7057b (Acts 43rd Legislature of Texas, Chapter 214, as amended) plaintiff, for each of the periods aforesaid and within the time permitted by law, at the time of filing its such reports and paying to the Comptroller of Public Accounts the taxes, filed with said Comptroller its formal written protest in which plaintiff set out fully and in detail the grounds and reasons why plaintiff contends that such tax and the demands for payment thereof under the interpretation of such Section XXIII by defendant, or under any other interpretation thereof, are unlawful and unauthorized.

[fol. 27]

XXIV

Defendant Robert S. Calvert, as Comptroller, in accordance with such V. A. C. S. 7057b, has transmitted to defendant Jesse James, State Treasurer of Texas, the sums of money received from plaintiff as set forth in numbered Paragraph XXII hereof and informed such Treasurer in writing that such money was paid under protest; and such Treasurer has in all things complied, as to such payments, with the provisions of V. A. C. S. 7057b applicable thereto.

XXV

The provisions of the aforesaid Section XXIII of such H. B. 285, as to such taking and retaining of gas by plaintiff and the tax sought to be imposed on plaintiff with respect thereto, are unlawful and unconstitutional, and the Comptroller of Public Accounts of the State of Texas is not lawfully entitled to demand or collect such tax; and

Panhandle has paid such tax under protest as stated above, on the following grounds, all of which were fully and in detail set out in written protest filed with such Comptroller as set forth in Paragraph XXIII hereof, to-wit:

1. As applied to the residue gas of which Panhandle "retains" possession at the outlet of the Phillips Sneed gasoline plant, as set forth in Subdivision (1) of Paragraph XVI hereof, the so-called "gathering" tax imposed under H. B. 285, is an attempt by the state to levy a tax on the privilege of retaining and continuing the transportation of gas which is *in* interstate commerce and on the activity of occupation of engaging in interstate commerce. Such tax is, therefore, violative of Subdivision 3 of Section 8 of Article I (the commerce clause) of the Constitution of the United States.

2. As applied to the residue gas of which Panhandle "takes" possession at the outlet of the Phillips gasoline [fol. 28] plant at Sneed, at the outlet of the Shamrock McKee plant and at the outlet of the Hansford gasoline plant, as set forth in Subdivisions (2), (3) and (4) of Paragraph XVI hereof, such so-called "gathering" tax imposed under H. B. 285 is an attempt by the state to levy a tax on the purchase of gas for immediate transportation in interstate commerce, on the entry of gas in interstate commerce. Such tax, therefore, is violative of Subdivision 3 of Section 8 of Article I (the commerce clause) of the Constitution of the United States.

3. The so-called "gathering" tax imposed by Section XXIII of H. B. 285 is violative of Subdivision 3 of Section 8 of Article I (the commerce clause) of the Constitution of the United States as applied to Panhandle's operations, in that it is levied upon a movement of goods in interstate commerce during the course of such commerce.

4. While denominated a "gathering" tax, the tax provided for in Section XXIII of H. B. 285 is not, in fact, a tax upon the exercise of the function of gathering gas as that term is consistently used in the industry, but is upon the act of taking gas into commerce and the privilege of retaining gas already in commerce. Since the gas of which Panhandle "takes" possession and the gas of which Panhandle "retains" possession is so "taken" and "retained" in and as a part of interstate commerce, such tax is, as to

such gas, violative of Subdivision 3 of Section 8 of Article I (the commerce clause) of the Constitution of the United States.

5. As applied to the residue gas so taken and purchased by Panhandle from Phillips and Shamrock, such tax is not imposed on the one who really gathers gas, either natural or residue; as that term is consistently used in the industry. This company has no part in the gathering of such gas and [fol. 29] owns no part of the facilities by which such gas is, in fact, gathered prior to the sale of the residue to this company, and the imposition of such tax on Panhandle is violative of the due process of the Fourteenth Amendment to the Constitution of the United States and of the due process section (Article I, Section 19) of the Constitution of the State of Texas.

6. The provision of Subdivision (4) of Section XXIII of H. B. 285 by which it was made unlawful for Panhandle to require under its contracts that Phillips and Shamrock pay the tax imposed under such act by reason of the "taking" of gas by Panhandle from such sellers is unreasonable, arbitrary and violative of the due process clause of the Fourteenth Amendment of the Constitution of the United States and the due process section (Article I, Section 19) of the Constitution of the State of Texas, and is violative of Article I, Section 10, of the Federal Constitution and Article I, Section 16, of the Texas Constitution, both of which prohibit the enactment of laws that impair the obligations of contracts.

7. Such Section XXIII of H. B. 285 is vague, indefinite, unintelligible and incapable of uniform application. It is, therefore, violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States and of the due process section (Article I, Section 19) of the Constitution of the State of Texas.

8. Since such Section XXIII of H. B. 285 is invalid as applied to gas retained and gas taken in interstate commerce, such tax imposed under such section is by the very wording of such Section XXIII invalid and inapplicable to the gas delivered by Panhandle to Southwestern Public Service Company for distribution in Gruver Texas, the gas delivered to three taps for gas used in irrigation, to the

New Hope School in Hansford County, Texas, and the farm taps—all of which are set forth in Subdivision XVIII hereof; and for the same reason such tax is invalid as to [fol. 30] the natural gas delivered by Panhandle to E. B. Dulaney and Skelly School as set forth in Subdivision XVI hereof.

XXVI

During the pendency of this suit additional monthly reports will be filed by plaintiff with such Comptroller dealing with gas similarly taken and retained by plaintiff subsequent to the periods above set forth. Payments of the tax due thereon by plaintiff for the gas so taken and so retained as shown from such reports will be made at the time of such filing, and the payments so made will be accompanied by formal protests similar to those heretofore filed, as stated in Paragraph XXIII hereof; and thereupon appropriate amended petitions will be filed dealing with such subsequent payments as authorized by such V. A. C. S. 7057b, as amended.

XXVII

Ninety days did not elapse between the date of any such payment of taxes and the filing of such protest before the filing of suit by this plaintiff for the recovery thereof.

XXVIII

For the reasons hereinabove and in such protests set out fully and in detail, the tax imposed on plaintiff under such Section XXIII of H. B. 285 is unlawful and unconstitutional as aforesaid, as to plaintiff; and the defendant Robert S. Calvert, State Comptroller, is not lawfully entitled to demand or collect the same; and this plaintiff is entitled to recover the sums so paid, together with the interest thereon, as is provided by Section 6 of such V. A. C. S. 7057b, as amended.

Wherefore, premises considered, plaintiff prays that on hearing, plaintiff have a judgment decreeing that the tax imposed by such Section XXIII of H. B. 285 cannot be lawfully applied to the operations of plaintiff as set out herein, [fol. 31] and that such tax is, as to plaintiff, unlawful and unconstitutional as aforesaid, and that the Comptroller of

Public Accounts of the State of Texas is not lawfully entitled to demand or collect the same from plaintiff; that the court find that the sums of money so paid by plaintiff under duress and under protest, together with the interest earned thereon, should be returned to plaintiff under appropriate orders; and that plaintiff have such further relief, legal or equitable, as it may show itself entitled to receive.

E. H. Lange, 1221 Baltimore, Kansas City, Missouri;
Culton Morgan Britain & White, Barfield Building, Amarillo, Texas; Chas. I. Francis Gene Woodfin, Houston, Texas; Looney, Clark & Moorhead, Brown Building, Austin, Texas, Attorneys for Plaintiff. (S.) Everett Looney, of Counsel.

[File endorsement omitted.]

[fol. 32] IN THE 126TH DISTRICT COURT OF TRAVIS COUNTY,
TEXAS

PANHANDLE EASTERN PIPELINE COMPANY

vs.

ROBERT S. CALVERT, et al.

DEFENDANTS' FIRST AMENDED ORIGINAL ANSWER—Filed
May 12, 1952

Now come Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, Jesse James, State Treasurer of the State of Texas, and Price Daniel, Attorney General of the State of Texas, defendants in the above entitled and numbered cause, and for their first amended original answer to plaintiff's original petition, in lieu of their original answer heretofore filed herein, would show to the Court as follows:

I

Defendants deny each and every allegation contained in plaintiff's original petition.

II

Defendants specially deny each and every allegation contained in Paragraph XXV of plaintiff's first amended original petition and allege that the tax levied and imposed by Section XXIII of H. B. 285, Acts 52nd Leg., 1951, is a tax levied upon any person engaged in the occupation of first taking or first retaining possession of gas produced in Texas for transmission through a pipeline or otherwise after severance of such gas within the State of Texas, and as such is an occupation tax upon such persons engaged in such occupation within the State of Texas, which bears a direct relationship to the opportunities, benefits, or protection conferred by the Constitution and laws of the State of Texas upon the persons engaging in the occupation so [fol. 33] taxed. The occupation tax so levied and imposed is equal and uniform as applied to all persons engaged in such business or occupation, whether in interstate commerce or intrastate commerce, and does not impose an undue burden upon or discriminate against any person engaged in such occupation or business in interstate commerce within the meaning of the Commerce Clause of the Constitution of the United States.

Wherefore, defendants pray that upon hearing hereof, they recover judgment that plaintiff take nothing by its suit, and that they recover all costs in this behalf expended.

Price Daniel, Attorney General of Texas; W. V. Gep-
pert, Assistant Attorney General; E. Wayne
Thode, Assistant Attorney General; (S.) C. K.
Richards, Assistant Attorney General, Attorneys
for Defendants, Capitol Station, Austin, Texas.

[File endorsement omitted.]

[fol. 34] IN THE 126TH JUDICIAL DISTRICT OF TRAVIS COUNTY,
TEXAS

MICHIGAN-WISCONSIN PIPE LINE COMPANY

VS.

ROBERT S. CALVERT, et al.

FINAL JUDGMENT OF THE COURT—Filed July 30, 1952

On the 30th day of June, A. D. 1952, came on regularly for trial the above numbered and entitled cause.

And came the plaintiff Michigan-Wisconsin Pipe Line Company, a corporation duly incorporated, by its attorneys of record, and the defendants Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, Price Daniel, Attorney General of the State of Texas, and Jesse James, State Treasurer of the State of Texas, by their attorneys of record.

And both plaintiff and defendants announced ready for trial, and no jury having been requested all matters of fact as well as of law were submitted to the court.

And the Court having heard the evidence (including the stipulations filed herein by the parties) and having heard argument of counsel, took the cause under advisement until the 26th day of July, 1952; and having considered such case, including written briefs filed by the parties, as well as the evidence and argument of counsel aforesaid, the court is of the opinion that the facts and the law are with the plaintiff and judgment is rendered for plaintiff and against the defendants as hereinafter decreed.

[fol. 35] It is therefore accordingly ordered, adjudged and decreed by the court on this 26th day of July, 1952, that plaintiff Michigan-Wisconsin Pipe Line Company do have and recover of and from the defendants Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, Price Daniel, Attorney General of the State of Texas, and Jesse James, State Treasurer of the State of Texas, as follows:

I

That Section XXIII of House Bill 285, Chapter 402, page 740, et seq., Acts of the 52nd Legislature of the State of

Texas, which became effective September 1, 1951, as such Section XXIII is interpreted by defendants or as in any manner interpreted, is invalid as to gas gathered, as that term is defined in the Act, for interstate transmission, in that the same is contrary to Subdivision 3 of Section 8 of Article I (the Commerce Clause) of the Constitution of the United States; all such gas so gathered, as that term is defined in the Act, was for interstate transmission.

II

That the defendant Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, was not and is not lawfully entitled to demand and collect such taxes from plaintiff; and the defendants are not entitled to retain such taxes so collected from plaintiff.

III

That plaintiff has heretofore made reports of taxes due and paid taxes to the defendant Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, within the time prescribed by law, covering taxes for each of the months from September 1951 through December 1951, and [fol. 36] from January 1952 through June 1952 in the total sum of four hundred twenty-eight thousand five hundred twenty-three and 86/100 dollars (\$428,523.86); that all such payments were made and were accompanied by a written protest filed simultaneously with the payment thereof as set out in Plaintiff's Original Petition filed herein on January 2, 1952, its First Amended Original Petition filed herein on March 17, 1952, its Second Amended Original Petition filed herein on May 12, 1952, its Third Amended Original Petition filed herein on June 30, 1952, and its Fourth Amended Original Petition filed herein on July 29, 1952; said grounds of protest being the same in each such petition, being hereby sustained.

IV

That defendant Robert S. Calvert, as Comptroller, has, in accordance with law, transmitted to defendant Jesse James, State Treasurer, the sums of money received from plaintiff and has informed the said Jesse James, State

Treasurer of the State of Texas, in writing that such money was paid under protest; and the defendant Jesse James, State Treasurer, has in all things complied with the applicable provisions of law as to such payments.

That such money so paid by the plaintiff was unlawfully demanded by the defendant Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, and that the same belongs to plaintiff, and the defendant Jesse James, State treasurer of the State of Texas, shall refund such sum of \$428,523.86, together with the pro rata interest earned thereon, to the plaintiff by the issuance of refund warrants, the same to be issued in separate series and to be used for making such refunds to be styled and designated "Tax Refund Warrants" and such warrants shall be written and [fol. 37] signed by the Comptroller and countersigned by the State Treasurer and charged against the Suspense Account and shall then be returned to the Comptroller and delivered by him to the plaintiff.

VI

All costs of court herein.

To which action of the court the defendants in open court excepted and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin.

Entered and ordered of record this 30th day of July, 1952.

(S.) Jack Roberts, Judge, 126th Judicial District Court, Travis County, Texas.

Approved as to form:

(S.) Everett L. Looney, of Counsel for Plaintiff;
(S.) Price Daniel, Attorney General, by Charles
D. Mathews, Assistant Attorney General, of Coun-
sel for Defendants.

[File endorsement omitted.]

[fol. 38] IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS,
126TH JUDICIAL DISTRICT

PANHANDLE EASTERN PIPE LINE CO.

VS.

ROBERT S. CALVERT, et al.

FINAL JUDGMENT OF THE COURT—Filed July 30, 1952

On the 30th day of June, A. D. 1952, came on regularly for trial the above numbered and entitled cause.

And came the plaintiff Panhandle Eastern Pipe Line Company, a corporation duly incorporated, by its attorneys of record, and the defendants Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, Price Daniel, Attorney General of the State of Texas, and Jesse James, State Treasurer of the State of Texas, by their attorneys of record.

And both plaintiff and defendants announced ready for trial, and no jury having been requested all matters of fact as well as of law were submitted to the court.

And the court having heard the evidence (including the stipulations filed herein by the parties) and having heard argument of counsel, took the cause under advisement until the 26th day of July, 1952; and having considered such case, including written briefs filed by the parties, as well as the evidence and argument of counsel aforesaid, the court is of the opinion that the facts and the law are with the plaintiff and judgment is rendered for plaintiff and against the defendants as hereinafter decreed.

It is therefore accordingly ordered, adjudged and decreed by the court on this 26th day of July, 1952, that plaintiff Panhandle Eastern Pipe Line Company do have and recover of and from the defendants Robert S. Calvert, Comptroller [fol. 39] of Public Accounts of the State of Texas, Price Daniel, Attorney General of the State of Texas, and Jesse James, State Treasurer of the State of Texas, as follows:

I

That Section XXIII of House Bill 285, Chapter 402, page 740, et seq., Acts of the 52nd Legislature of the State

of Texas, which became effective September 1, 1951, as such Section XXIII is interpreted by defendants or as in any manner interpreted, is invalid as to gas gathered, as that term is defined in the Act, for interstate transmission, in that the same is contrary to Subdivision 3 of Section 8 of Article I (the Commerce Clause) of the Constitution of the United States.

That as to gas gathered by plaintiff for intrastate consumption the tax, therefore, is not collectible by the express terms of the Act, to-wit, Subsection 11 thereof, which expressly provides that "In the event the tax levied by this Section is declared unconstitutional or invalid by a court of competent jurisdiction as to gas gathered for interstate transmission, the tax shall not be levied as to gas gathered for intrastate consumption."

That the gas so gathered, as that term is defined in the Act, by plaintiff was in large part for interstate transmission and in small part for intrastate consumption.

II

That the defendant Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, was not and is not lawfully entitled to demand and collect such taxes from plaintiff; and the defendants are not entitled to retain such taxes so collected from plaintiff.

[fol. 40]

III

That plaintiff has heretofore made reports of taxes due and paid taxes to the defendant Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, within the time prescribed by law, covering taxes for each of the months from September 1951 through December 1951, and from January 1952 through June 1952 in the total sum of Four Hundred Eighty-four Thousand Eight Hundred Twenty-six and 86/100 Dollars (\$484,826.86); that all such payments were made and were accompanied by a written protest filed simultaneously with the payment thereof as set out in Plaintiff's Original Petition filed herein on January 2, 1952, its First Amended Original Petition filed herein on March 17, 1952, its Second Amended Original Petition filed herein on May 12, 1952, its Third Amended Original

Petition filed herein on June 30, 1952, and its Fourth Amended Original Petition filed herein on July 29, 1952; said grounds of protest being the same in each such petition, being hereby sustained.

IV

That defendant Robert S. Calvert, as Comptroller, has, in accordance with law, transmitted to defendant Jesse James, State Treasurer, the sums of money received from plaintiff and has informed the said Jesse James, State Treasurer of the State of Texas, in writing that such money was paid under protest; and the defendant Jesse James, State Treasurer, has in all things complied with the applicable provisions of law as to such payments.

V

That such money so paid by the plaintiff was unlawfully demanded by the defendant Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, and that the same [fol. 41] belongs to plaintiff, and the defendant Jesse James, State Treasurer of the State of Texas, shall refund such sum of \$484,826.86, together with the pro rata interest earned thereon, to the plaintiff by the issuance of refund warrants, the same to be issued in separate series and to be used for making such refunds to be styled and designated "Tax Refund Warrants" and such warrants shall be written and signed by the Comptroller and countersigned by the State Treasurer and charged against the Suspense Account and shall then be returned to the Comptroller and delivered by him to the plaintiff.

VI

All costs of court herein.

To which action the court the defendants in open court excepted and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin.

Entered and ordered of record this 30- day of July, 1952.

(S.) Jack Roberts, Judge, 126th Judicial District Court, Travis County, Texas.

3-198-201

Approved as to Form:

(S.) Everett L. Looney, of Counsel for Plaintiff;
(S.) Price Daniel, Attorney General; by (S.)
Charles D. Mathews, Assistant Attorney General,
of Counsel for Defendants.

[File endorsement omitted.]

[fol. 42] IN THE COURT OF CIVIL APPEALS, THIRD SUPREME
JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

No. 10,116

PANHANDLE EASTERN PIPE LINE COMPANY, Appellee

vs.

ROBERT S. CALVERT, Comptroller, et al., Appellants,

No. 10,117

ROBERT S. CALVERT, Comptroller, et al., Appellants

vs.

MICHIGAN-WISCONSIN PIPE LINE COMPANY, Appellee

No. 10,118

ROBERT S. CALVERT, Comptroller, et al., Appellants

vs.

AMARILLO OIL COMPANY, Appellee

From District Court of Travis County, 126th Judicial
District Nos. 91,332, 91,338 and 91,508, Respectively

Hon. Jack Roberts, Judge

OPINION—Filed February 4, 1953

These three causes in all of which Texas officials Robert
S. Calvert, Comptroller of Public Accounts, Price Daniel,
Attorney General and Jesse James, State Treasurer, are

appellants and the Panhandle Eastern Pipe Line Company is appellee in Cause No. 10,116, the Michigan-Wisconsin [fol. 43] Pipe Line Company is appellee in Cause No. 10,117 and the Amarillo Oil Company is appellee in Cause No. 10,118,¹ were consolidated for trial below, were consolidated in this Court for hearing and argument and will all be disposed of by this opinion.

These suits were all brought under and in compliance with Art. 7057b, Vernon's Annotated Civil Statutes of Texas, authorizing and regulating institution of suits for the recovery of license and privilege taxes paid under protest.

Each appellee sought recovery of taxes paid under protest, such payments having been made in obedience to the provisions of Art. 7057f, Vernon's Annotated Statutes of Texas.²

Trial below was nonjury and resulted in judgments for appellees for recovery of the sums for which they sued.

Findings of fact and conclusions of law were not requested of nor filed by the trial judge.

The single question presented for our decision is whether Article 7057f, a revenue statute, the pertinent portions of which are set out below,³ as applied to the business activities

¹ These appellees will be hereinafter referred to as Michigan-Wisconsin, Panhandle and Amarillo, respectively.

² Sec. XXIII, H. B. 285, Chapter 402, page 740, Acts of 1951, 52nd Legislature of the State of Texas.

³ "Art. 7057f. Occupation tax on business of gathering gas. Definitions: Section 1. The provisions of Texas Revised Civil Statutes (1925) Articles 10, 11, 12, 14, 22, and 23 and Texas Laws 1947, Chapter 359, on the interpretation of Statutes shall apply specifically to this Section. In addition to these standard definitions, in this Section, unless the context otherwise requires:

"(a) 'Gas' means natural and casing-head gas or other gas taken from the earth or waters, regardless of whether produced from a gas well or from a well also productive of oil, distillate, condensate or other product.

"(b) 'Casing-head gas' means any gas or vapor in-

[fol. 45] of appellees, violates the commerce clause of the Constitution to an oil stratum and produced from such stratum with oil.

“(c) ‘Gathering gas’ means the first taking or the first retaining of possession of gas produced in Texas for transmission whether through a pipe line, either common carrier or private, or otherwise after severance of such gas, and after the passage of such gas through any separator, drip, [fol. 44] trap, meter or other method designed to separate the oil therefrom. In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term ‘gathering gas’ means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipe line, either common carrier or private or otherwise after such gas has passed through the outlet of such plant.

“(d) ‘Gatherer’ means any person engaged in the gathering of gas.

“(e) ‘Person’ means and includes any person, firm, concern, receiver, trustee, executor, administrator, agent, institution, association, partnership, company, corporation, and persons acting under declarations of trust, as well as trustees acting under declarations of trusts.

“(f) ‘Cubic foot of gas’ or ‘standard cubic foot of gas’ shall have the definition ascribed thereto by Texas Laws, 1949, Chapter 519, Section 4, Texas Revised Civil Statutes (Vernon, 1948), Article 7047b, Section 2 (12).

“Imposition of tax; amount; calculation.

“Sec. 2. In addition to all other licenses and taxes levied and assessed in the State of Texas, there is hereby levied upon every person engaged in gathering gas produced in this State, an occupation tax for the privilege of engaging in such business, at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered.

“In determining the quantity of the gas for the purposes of calculating such tax, there shall be excluded (a) gas produced and then lawfully injected into the earth of this State; (b) gas used for fuel in connection with lease or field opera-

Constitution of the United States.⁴ If so it is void, if not it is valid.

Each appellee is engaged in the business of transporting natural gas by pipe line. There is no dispute as to the manner in which their business activities were conducted. These matters were stipulated. Since Michigan-Wisconsin presents the strongest factual position favorable to appellees we will fully describe it and its activities first.

tions; (c) gas lawfully vented or flared; and (d) gas used in the manufacturing of carbon black.

“Payment; penalty for delay.

“Sec. 3. The tax levied hereby shall be paid by the gatherers on the 25th day of each month on all gas gathered in the State during the next preceding thirty (30) days prior to the first day of the month in which payment is required to be made. If such payment is not made within the time above prescribed, the amount due shall become delinquent and a penalty of ten percent (10%) of the amount of the tax shall be added and such tax and penalty shall bear interest at the rate of six per cent (6%) per annum from date due until paid.

“Unlawful to require producer to pay.

“Sec. 4. The tax imposed by this Act is a tax on the occupation of gathering gas and not on the production of gas; therefore, it shall be unlawful for any gas gatherer to require any producer to pay the tax imposed under this Act under any contract provision between the producer and the gas gatherer allowing the gatherer to deduct from sums owed the producer amounts paid by the gatherer *to deduct from sums owed the producer amounts paid by the gatherer* by reason of the imposition of a tax on production. . . .

“Sec. 11. In the event the tax levied by this Section is declared unconstitutional or invalid by a court of competent jurisdiction as to gas gathered for interstate transmission, the tax shall not be levied as to gas gathered for intrastate consumption.

⁴ Section 8 of Article I of the Federal Constitution provides that Congress shall have the power “To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.” (Cl. 3).

Michigan-Wisconsin is a natural gas company as defined in the Federal Natural Gas Act and holds certificates of convenience and necessity issued by the Federal Power Commission. Such certificates authorize it to engage in interstate transportation and sale of natural gas. It has constructed a pipe line which originates at a point in Hansford County, Texas, and which terminates at various points in the States of Michigan and Wisconsin. At these points, and at other points in the States of Missouri and Iowa, it sells natural gas to distribution companies which serve markets in those areas. It sells no gas in Texas.

Michigan-Wisconsin produces no gas in Texas or elsewhere. Rather, it supplies its markets by purchasing gas from Phillips Petroleum Company. Through a network of pipelines, Phillips brings natural gas from the wells from which it is produced to its Sherman gasoline plant located in Hansford County, Texas. At this plant, certain liquefiable hydrocarbons are removed from the gas, and, at the outlet side of the plant, Phillips sells the gas to Michigan-Wisconsin.

Under contracts between Phillips and Michigan-Wisconsin, [fols. 46-47] sin, Phillips obligates itself to deliver to Michigan-Wisconsin all of the requirements for the latter's pipe line, up to a maximum of 343 million cubic feet daily. To secure performance of this agreement, Phillips has dedicated all of the gas underlying certain lands described in the contracts, and, with minor exception, has agreed that it will sell no gas from such lands to anyone except Michigan-Wisconsin.

In these contracts, Phillips reserved the right to extract certain liquefiable hydrocarbons from the raw gas. This extraction is performed by Phillips with absorbers at its gasoline plant. When the gas leaves the absorbers it flows through pipes owned by Phillips for a distance of 300 yards to the outlet of the gasoline plant. When the gas emerges from the outlet, it flows directly into the pipe line of Michigan-Wisconsin, and it continues flowing through the Michigan-Wisconsin pipe line system until it reaches markets in other states.^{4a} This pipe line is in the State of

^{4a} This gas after its delivery to Michigan-Wisconsin at the outlet of the processing plant travels through two 26-

Texas for only 1.74 miles, the remainder being in other states.

The movement of such gas from the producing wells to points of delivery to Michigan-Wisconsin at the outlet of the Phillips gasoline plant and thence through pipe lines to consumers in Michigan-Wisconsin is a steady and continuous flow. The taking of such gas at the outlet of the gasoline plant is accomplished through facilities owned by Michigan-Wisconsin and used exclusively by it in the taking and transportation of such gas.

All of the gas is purchased by Michigan-Wisconsin for transportation to points outside Texas, and all of such gas is in fact so transported.

It was further stipulated by the parties:

“Natural gas in going through a gasoline plant or other process to separate oil, gasoline or other liquid [fol. 48] hydrocarbons or to extract hydrogen sulphide or carbon dioxide or any other element undergoes certain changes, both in quality and quantity. Among the changes are these: The residue gas leaving the extraction or separating device is usually at a lower pressure, the temperature is sometimes higher, and the specific gravity of the gas is less than that of the natural gas which enters such plant. There are differences between the proportion of the methane content, the ethane content and the content of other hydrocarbons. Likewise, when the hydrogen sulphide or carbon dioxide are extracted, there is a percentage variance in the constituents remaining in the gas. In

inch pipe lines a distance of approximately 1215 feet to a compressor station owned and operated by Michigan-Wisconsin at which station the pressure of such gas is raised from approximately 200 pounds to approximately 975 pounds. In the compressor station the gas is compressed, cooled, scrubbed and dehydrated in the course of the flow through the station. At the outlet of such compressor station, such gas passes into Michigan-Wisconsin's 24-inch pipe line, flowing through such pipe line approximately 1.74 miles to the Texas-Oklahoma line and continuing through such pipe line to markets outside the State of Texas.

addition to these changes in constituents, the volume of the residue gas is less than the volume of the natural gas which enters the extraction plant due to the removal of some of the constituents of the natural gas."

Except for minor variations Panhandle conducts its activities in the same manner as Michigan-Wisconsin. Panhandle loads its interstate pipe line with gas from the outlets of three gasoline plants, rather than with gas from only one plant; it produces a portion of the gas which it takes at the outlet of one of such plants; and it makes sales in Texas to three small customers, rather than sending all of its gas outside the State.⁵

Amarillo produces no gas. It purchases gas produced in Texas and transports it by pipe lines in intrastate commerce only.⁶

Regarding the natural gas business in Texas it was stipulated that:

"But for the Texas oil and gas conservation statutes, and the enforcement by the Railroad Commission of Texas, producers in the field could drill as many wells as they desired and could open their wells at the rate of 100% open flow and could burn both the sweet and sour gas for the production of carbon black, or they could extract the gasoline and other liquid hydrocarbons in a gasoline plant and flare the residue gas. If this hapened, the gas in the reservoir would become depleted in the course of a few years. If only a portion of the producers in the field drilled additional [fol. 49] wells and operated such wells at 100% open flow, such producers would in the course of a few years drain the gas from under the acreage of the producers who were not also producing at 100% open flow from a proportionate number of wells. After such field should be depleted, neither Michigan-Wis-

⁵ A schematic diagram of the operations of Michigan-Wisconsin and Panhandle is attached to and made a part of this opinion.

⁶ Amarillo's only ground of protest is based on Sec. 11 of Art. 7057f, copied supra.

consin nor any other purchaser of gas could supply its market demand with gas from such fields and the same would be true with respect to any other field in the state which might be subjected to the same rapid depletion in the absence of the Texas oil and gas conservation statutes and the enforcement thereof."

Stipulated too was that the State of Texas exercises control and jurisdiction over the drilling, completing, and production of oil and gas wells, and over the plants that extract gasoline or other liquid hydrocarbons from gas, and that neither the Congress of the United States, the Federal Power Commission, nor any other Federal Agency has by any law, rule or regulation exercised any control or jurisdiction over such activities.

William James Murray, Jr., a petroleum engineer by profession and a member of the Railroad Commission of Texas, the state agency which enforces oil and gas conservation statutes, testified, without contradiction, at length regarding the special benefits conferred upon the gas industry by such statutes and their enforcement.

After recounting the successful efforts of the Railroad Commission in curtailing the flaring and wasting of gas⁷ Mr. Murray was interrogated as follows:

"I would like for you to explain if it is a fact how the State of Texas, by virtue of the oil and gas conservation statutes and their enforcement by the Railroad Commission, has given any opportunities, if it has, and afforded any protection or conferred any benefits upon those who take or retain gasoline—gas at the outlet of a gasoline processing plant for transmission through pipelines? Has the State of Texas conferred any benefits or privileges to those people by virtue of its conservation laws?

⁷ That Texas courts had a part in these efforts see *Railroad Commission v. Shell Co. Inc.*, 146 Tex. 286, 206 S.W. 2d 235, *Railroad Commission v. Sterling Oil and Refining Co.*, 218 S.W. 2d 415, 147 Tex. 547, and *Railroad Commission v. Flour Bluff Oil Corporation*, 219 S.W. 2d 506 (Austin C.C.A., writ ref.).

[fol. 50] "A. Yes, I think very material benefits.

"Q. Will you explain in detail what those benefits are?

"A. Well, partially my explanation would involve repetition of my statement earlier, that an interstate or intrastate pipe line must spend a tremendous amount of money in laying these facilities, and therefore, they have got to have assurance of long life reserves, and by preventing waste of gas, by increasing recovery of gas, we have given them the assurance of these long life reserves, which have made it possible for them to build the lines and for them to reap great profits from it. I could illustrate, back years ago when we were flaring so much gas from the Panhandle, you remember I mentioned at one time we were flaring a billion feet of gas a day, and here gas was just going to waste, and cities back East were very desirous, much in need of natural gas, but you couldn't afford to build a pipe line from the Chicago area, for example, to the Panhandle, even though the gas was so cheap they were just blowing it into the air instead of saving it. You could get your gas for nearly nothing, but you couldn't afford to build a pipe line down there because that field wasn't going to last long enough under the poor conservation practices to pay out the line, even though they could have been given the gas, and then when legislation and Commission regulation that wastage of gas was stopped, and it became apparent that when the reserves of the Panhandle were going to be required to be wisely utilized, they could then see that they had reserves for many years. We will talk in the terms of 25 years, and so a great number of gas pipe lines began to be built. I very keenly feel that conservation has made it possible, made it financially practical for these intercontinental, transcontinental pipe lines to come into business, and I trust I have made my answer clear in that phase. Now, after the day of stopping the flaring of gas, the Commission's regulation of casinghead gas, and our drive to stop the flaring of casinghead gas had gone hand in glove with the building of new interstate gas pipe lines to come get this casinghead gas. I regret I don't have in mind the reserves of the state, but nearly fifty per cent, if I recail correctly, of the gas reserves of this state is casinghead gas. Excuse me. There is nearly fifty per cent as

much casinghead gas reserves as there is natural gas reserves. Well, there, when you start using casinghead gas instead of just blowing it to the air, look how tremendously you have increased the potential reserves of gas in Texas which are available to supply these interstate pipe lines, and the report of the Gas Conservation Engineering, on which I was privileged to serve, has been used in rather numerous Federal Power Commission hearings showing how much casinghead gas was being produced and flared down in Texas and how the Railroad Commission was planning to force the curtailment of that waste, and that therefore these reserves would be available for dedication to these pipe lines. . . .

[fol. 51] "Q. Mr. Murray, I believe you stated that in your opinion, that in the absence of our state conservation laws and the enforcement by the Railroad Commission, that it would not have been economically feasible to have built a long line of pipe line to come in and get natural gas. I believe you stated that, didn't you?

A. Yes, sir. . . .

A. My answer was yes, that I had so stated, both that in my opinion, and historical events demonstrate that it was true that they could not build them in the absence of those regulations, and the pipe lines began to be built only after the regulations.⁸

⁸ This latter statement was modified on cross-examination, Mr. Murray saying:

"I have previously explained my lack of clarity yesterday in my thinking and my understanding of just what we were restricted to, and I was largely discussing general principles as applicable to the State as a whole. I do not retract in the slightest the general statement that it is not feasible to build a transcontinental pipe line into an area where terrific waste will take place. I may have left the impression that no pipe lines were built into the Panhandle until after the waste had been stopped. I actually didn't have in mind the dates when all of the lines were built into the Panhandle, but a good many of those lines, as was brought out

[fol. 52] Another benefit accruing to purchasers of gas in Texas and credited to its regulation of the industry was that of making nominations for gas to satisfy market demand about which Mr. Murray testified:

"... In your opinion, Mr. Murray, does this privilege conferred upon takers of gas or the folks that are retaining gas for transmission in both interstate and intrastate commerce, to make nominations in order to measure the—meet their market demands, do you consider that a valuable right and privilege?

"A. Oh, yes, very definitely, for the purchaser. The whole point of the nominations is to assure to the purchasers of gas within the limits of ratable take, that they will get the gas that they need. As far as the producer is concerned and the Commission is concerned, we could just set a fixed amount of gas each month

on cross-examination, were built prior to the beginning of the large amount of wastage in the Panhandle, and I can state that those lines would have been severally adversely affected, those lines already built, had the waste which began to occur after the lines were built had been allowed to continue. It is doubtful in my judgment whether the lines would ever have been able to amortize, if waste had continued at the maximum rate at which gas was wasted from the Panhandle Field."

Q. I will ask you to state in your opinion what would the effect be upon those that are now taking and retaining the gas for transmission to the eastern and northern states, if the State of Texas repealed its conservation laws at this time or just failed to enforce them?

A. If all of the oil and gas conservation laws were repealed or there was no enforcement of the laws, the effect on these pipe lines, in my judgment, would be to cause great loss of investment. I don't think any of the recently built pipelines which have not been paid out would ever be amortized, and there would be also a great suffering on the part of the consumers who are dependent upon these sources of supply of gas. . . ."

and allow them to produce that amount of gas each month, it would be a whole lot easier on the producer and a lot easier on the Commission, but it wouldn't assure the purchaser the gas he wants, and so we go to a tremendous amount of trouble and calculations in order to see that always the purchaser is getting the gas that he wants. Consequently I do consider it a very valuable right and privilege, and if I might amplify my answer a while ago, the Legislature specifically for the benefit of the pipeline passed an over and under six months balancing provision, so that in the case I mentioned a while ago, while there was—say, the Carthage Field where there are several pipelines, if a producer doesn't happen to have connections to sufficient wells to give him as much allowable as he needs during a particular month, he can over-produce. The Legislature said that is all right, and the Commission says that is all right. It is kind of like an overdraft at the bank, and then the next month, if his demand has fallen off, he may have too much gas, and then he underproduces and makes up his overdraft, and he can overdraw for a period of six months, and then have six months in which to make it up. Now, if **in the period of a year's time you don't balance out**, why, then, we begin to start cutting them off, and say: 'Look, you just might as well get out and hustle you some more gas.' Just like your banker will take care of your overdraft for a while, but not indefinitely, but that has gone a long ways toward solving the problem of the Commission requirement that ratable take exists between the producers, and affording these various pipelines serving a single field the ability to get gas whenever their particular customers demand it, and I do consider that a very valuable right and privilege to the gas companies."

The point at which maximum benefits of State regulation was attained was fixed by Mr. Murray as being at the [fol. 53] outlet of the processing plant, his testimony in this regard being:

"In the case of either gas well gas or casinghead gas that is processed in a plant for the extraction of

gasoline or other liquid hydrocarbons, at which place could such gas be taken or retained by a person for transmission so that the person so taking or retaining for transmission would receive the maximum benefit of whatever benefits he does receive from the enforcement of our state oil and gas conversation statutes?

"A. Well, I would say obviously the maximum benefit would be at the outlet of the plant, because the plant itself operates under the Commission's conservation regulations, and benefits accrue from these regulations of the operation of the plant, and so my answer the point at which the maximum benefits occur would be after the gas has been finally processed through the plant, at the outlet of the plant.

"Q. Where gas is produced and flows from the well head to a plant that separates the gasoline or other liquid hydrocarbons therefrom, where is the first place that gas could be taken or retained for transmission that such gas is in the best or proper condition to be transmitted by a pipeline for any considerable distance?

"A. Well, now, I am assuming from your question by the fact that the gas is processed in a plant that it needs to be processed in a plant, and consequently gas which has sufficient liquid content that it requires processing isn't in suitable condition for long distance transportation until it has been processed, and therefore it obviously follows that the first time the gas is suitable for transmission, bearing in mind I am predicating it on it being wet gas to start with, is after it has been processed through a plant. Now, by further explanation that there are dry gas wells which do produce gas that is suitable in its condition as it comes from the well head to be transmitted through a pipeline, but you don't process that kind of gas in a gasoline plant, so when you told me that it was being processed, it obviously followed that it is only suitable for transmission after it has been processed.

"Q. You said after it has been processed. Do you mean by that at the outlet of the gasoline plant?

"A. Yes, sir, at the outlet of the gasoline plant."

So much for the facts.

The law will now be inquired into and our conclusions stated as briefly as possible. This we do with full knowledge that the only forum having ultimate and exclusive jurisdiction to authoritatively determine the issue before us is the Supreme Court of the United States.

[fol. 54] Our conclusions, presently to be stated, have been reached after a painstaking study of all the Federal Supreme Court decisions which have been cited by the parties. None of these cases is factually in point. This case then must turn upon a practical application of basic principles adduced from these authorities to the facts. As stated by the court in *Union Brokerage Company v. Jensen*:⁹

"We have considered literally scores of cases in which the States have exerted authority over foreign corporations and in doing so have dealt with aspects of interstate and foreign commerce. Whatever may be the generalities to which these cases gave utterance and about which there has been, on the whole, relatively little disagreement, the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances. To review them to any extent would be writing the history of the adjudicatory process in relation to the Commerce Clause."

Similarly in *Utah Power and Light Co. v. Pfof*:¹⁰

". . . we must not lose sight of the fact that taxation is a practical matter and that what constitutes commerce, manufacture or production is to be determined upon practical considerations."

The problem of the federal courts in this field of litigation has been "to reconcile competing constitutional demands so that commerce between the states shall not be

⁹ 322 U. S. 202, 88 L. ed. 1227.

¹⁰ 286 U.S. 165, 76 L. ed. 1038.

unduly impeded by state action, and that the power to levy taxes for the support of state government shall not be unduly curtailed.”¹¹

It is certain that the State may not for revenue purposes levy a direct tax upon the privilege of engaging in interstate business.¹²

[fol. 55] It is equally certain that:

“(But) it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, *Western Live Stock v. Bureau of Revenue*, 303 US 250, 254, 82 L. ed 823, 826, 58 S. Ct. 546, 115 ALR 944. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress.”¹³

After referring to various decisions the Court continued:

“In few of these cases could it be said with assurance that the local tax does not in some measure affect the commerce or increase the cost of doing it. But in them as in other instances of constitutional interpretation so as to insure the harmonious operation of powers reserved to the states with those conferred upon the national government, courts are called upon to

¹¹ *McGoldrick v. Berwind-White Coal Min. Co.*, 309 U.S. 33, 84 L. ed. 565.

¹² *Spector Motor Service v. O'Connor*, 340 U.S. 602, 95 L. ed. 573. However, money payments burdening interstate commerce may be exacted by the State as reimbursement for providing facilities and enforcing lawful regulations of commerce. *Ingels v. Marf*, 300 U.S. 29, 81 L. ed. 653.

¹³ *McGoldrick v. Berwind-White Coal Min. Co.*, 309 U.S. 33, 84 L. ed. 565.

reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed."

In *Memphis Natural Gas Co. v. Stone*,¹⁴ it was said:

"The federal courts have sought over the years to determine the scope of a state's power to tax in the light of the competing interests of interstate commerce, and of the states, with their power to impose reasonable taxes upon incidents connected with that commerce. See *Gwin, White & Prince V. Henneford*, 305 US 434, 441, 83 L. ed 272, 277, 59 S. Ct. 325. We continue at that task, characterized long ago as an area of 'nice distinctions.' . . .

"The cases just cited in the note show that, from the viewpoint of the Commerce Clause, where the corporations carry on a local activity sufficiently separate from the interstate commerce state taxes may be validly laid, even though the exaction from the business of the taxpayer is precisely the same as though the tax had been levied upon the interstate business itself. [fol. 56] But the choice of a local incident for the tax, without more, is not enough. There are always convenient local incidents in every interstate operation. *Nippert v. Richmond*, *supra* (327 US at 423, 90 L. ed 764, 66 S. Ct. 586, 162 ALR 844). The incident selected should be one that does not lend itself to repeated exactions in other states. Otherwise intra-state commerce may be preferred over interstate commerce."

and the Court concluded:

"We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is

¹⁴ 335 U.S. 80, 92 L. ed 1832.

not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, give protection and that state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

In *Spector Motor Service v. O'Connor*.¹⁵ it is said:

"It is not a matter of labels. The incidence of the tax provides the answer."

The incidence of the tax here is, according to the statute, the gathering of gas, defined to be:

" . . . the first taking or the first retaining of possession of gas produced in Texas for transmission whether through a pipe line, either common carrier or private, or otherwise after severance of such gas, and after the passage of such gas through any separator, drip, trap, meter or other method designed to separate the oil therefrom. In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipe line, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant."

That the gathering of gas, so defined, is a local activity within the State of Texas and not subject to repetition elsewhere is apparent and since appellees do not allege the statute to be discriminatory, the sole question is whether such local activities are so closely related to and such an integral [fol. 57] part of the interstate business of appellees who transport gas in interstate commerce as to be within the scope of the Commerce Clause of the Constitution.

Considered from a practical point of view, we think not. If the incidence of the tax here was the production of

¹⁵ 340 U. S. 602, 95 L. Ed. 573.

gas there would be no question about the validity of the statute.¹⁶ The tax here is not so laid. In fact the statute makes unlawful the saddling of this tax upon the producer. The reason for this is to be partly found in references in legislative debates to the "already overtaxed landowner, royalty owner and producer."¹⁷ This situation could only result from long term commitments to sell gas at low prices, otherwise the Legislature would not have been so solicitous for the welfare of the producer for if the producer could pass on to the consuming public a tax increase then his position would not be one of hardship.

If on the other hand the Legislature was impotent to levy a tax relating to this gas because, as appellees contend, it "is in interstate commerce from the time it leaves the mouths of the wells" then the only legislature alternative was to levy an additional production tax without regard to the disastrous effect which might be visited upon producers.

There is nothing illegal nor immoral in the enactment of tax laws with the knowledge and expectation that those upon whom the tax initially falls will make recoupment from others.¹⁸ Most excise taxes are of this nature and unless they can be passed on to the consumer the manufacturer or producer could not long survive.

Of course landowners and producers of gas could have protected themselves by contract but when gas was so worth-[fol. 58] less as to be flared at the rate of a billion cubic feet daily from one Texas field it is small wonder that producers and owners did not quibble over contract terms when anything at all was offered for their gas.

We also have the firm conviction that the power of the State, employed through the exercise of legislative discretion, to select local incidents related to interstate commerce for the purpose of taxation should not be limited or defined by the physical properties or characteristics of the subject matter which in this instance is natural gas.

As we view it these characteristics form the basis for

¹⁶ *Hope Natural Gas Company v. Hall*, 274 U.S. 284, 71 L. ed. 1049.

¹⁷ *House Journal*, June 1, 1951, p. 3350.

¹⁸ *Texas Company v. Brown*, 258 U.S. 466, 66 L. ed. 721.

appellees' conclusions that the gas here moves in a continuous flow from the mouths of the wells in interstate commerce. The same reasoning could send the interstate commerce label down the well and into subterranean chambers where the movement of gas actually commences. The mouth of the well is merely an arbitrary point along the road traveled by the gas. There is no legal reason known to us for fixing the mouth of the well as the dividing line separating State and Federal jurisdictions in matters of commerce and taxation.

It is the nature of gas, since it is lighter than air, to move when relieved of pressure. Stationary gas has no utilitarian value. Such value is attained only when gas moves in a steady and continuous flow. Nor can gas be economically stored except in its natural reservoirs. The movement of gas has no necessary relation to interstate commerce or to commerce at all. It moves, willy nilly, if not contained.

A similar problem was solved by the Court in *Utah Power and Light Co. v. Pfof*¹⁹ where it was held that generation of electricity was a local activity not inseparably related to [fol. 59] its transmission, the Court saying:

"While conversion and transmission are substantially instantaneous, they are, we are convinced, essentially separable and distinct operations. The fact that to ordinary observation there is no appreciable lapse of time between the generation of the product and its transmission does not forbid the conclusion that they are, nevertheless, successive and not simultaneous acts."

Here there is contractual interference with the transmission of the gas in interstate commerce until after the gas has emerged from processing plants as well as actual interference caused by the processing itself.²⁰ That there is no appreciable lapse of time between processing of the gas, the taking or retaining of the gas and its transmission

¹⁹ 286 U.S. 165, 76 L. ed. 1038.

²⁰ In *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172, 67 L. ed. 929, the Court said: "The ore does not enter interstate commerce until after the mining is done. . . ."

is, as we have seen, unimportant since they are successive and not simultaneous acts.

We believe that the tax levied by this statute is fairly commensurate with the protection and benefits conferred by the State upon those engaged in the occupation described. We also believe that this statute represents an exercise of legislative discretion with which the Constitution of the United States does not require and the courts should not command interference. The statute, to us, seems to reflect a sincere effort on the part of the Legislature to deal fairly and justly with the State, its citizens and with all others who share in the enjoyment of one of the great though vanishing, exhaustible and irreplaceable natural resources of the State of Texas.

In passing upon the question before us we have borne in mind the admonition of Chief Justice Marshall that:

“The question, whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. [fol. 60] But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.”²¹

We have no clear or strong conviction that this statute and the Constitution are incompatible.

The statute does not purport to, was not designed to and in fact does not interfere with the authority of Congress to regulate interstate commerce.

All that truthfully can be said of the statute is that it increases the cost of gas to the consuming public. There are few if any ad valorem, privilege or excise taxes which

²¹ Fletcher v. Peck, 6 Cranch 87, 3 L. ed. 162.

do not have similar effect in their respective fields. This, however, is not a defect.

The taxable event described by the statute, as to Michigan-Wisconsin, occurs between processing conducted by Phillips and further processing done by Michigan-Wisconsin in the State of Texas, all prior to the time that the gas is finally committed to its interstate journey. Such event, that is the taking or retaining of the gas at the gasoline plant outlet, is just as local in nature as the production itself is local. The judicial consequences in each instance should be the same. We believe they are the same.

It follows that, in our opinion, the statute is valid.

The judgment in each of these cases is reversed and judgments are here rendered that the respective plaintiff therein take nothing by its suit.

Robert G. Hughes, Associate Justice.

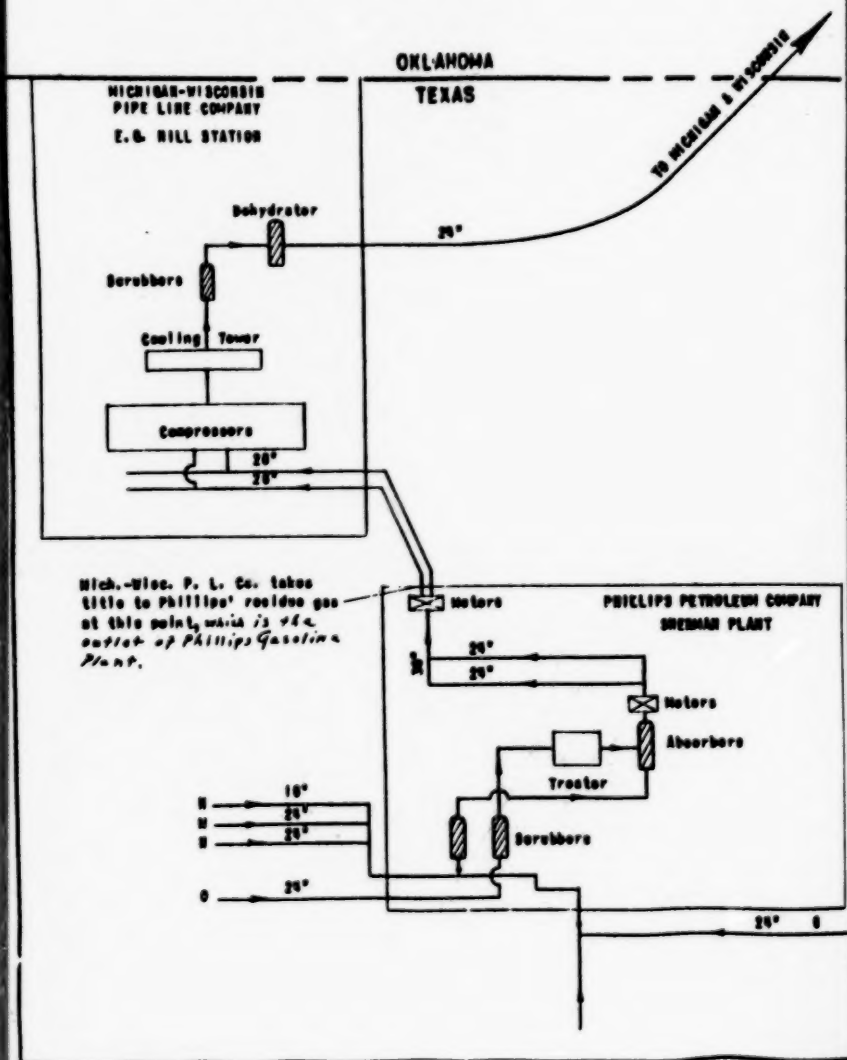
Reversed and rendered.

Filed: February 4, 1953.

(Here follow 2 photos, fols. 61 and 62.)

SCHEMATIC LAYOUT

MICHIGAN-WISCONSIN PIPE LINE COMPANY - PHILLIPS PETROLEUM COMPANY



[fol. 62a] IN THE COURT OF CIVIL APPEALS

10,117—ROBERT S. CALVERT, Comptroller, et al., vs. MICHIGAN-WISCONSIN PIPE LINE COMPANY, Appeal from 126th District Court of Travis County. Opinion by Associate Justice Hughes

JUDGMENT OF THE COURT OF CIVIL APPEALS RENDERED ON
FEBRUARY 4, 1953

This Cause came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was error in the judgment, It Is Therefore considered, adjudged and ordered that the judgment of the trial court be and it is hereby reversed and judgment is here rendered that the Appellee take nothing by its suit.

It Is Further Ordered that the Appellee Michigan-Wisconsin Pipe Line Company pay all costs in this behalf expended, both in this Court and in the court below, and that this decision be certified below for observance.

[fol. 62b] IN THE COURT OF CIVIL APPEALS

10,116—ROBERT S. CALVERT, Comptroller, et al. vs. PANHANDLE EASTERN PIPE LINE COMPANY, Appeal from 126th District Court of Travis County. Opinion by Associate Justice Hughes

JUDGMENT OF THE COURT OF CIVIL APPEALS RENDERED ON
FEBRUARY 4, 1953

This Cause came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was error in the judgment, It Is Therefore considered, adjudged and ordered that the judgment of the trial court be and it is hereby reversed and judgment is here rendered that the Appellee take nothing by its suit. It Is Further Ordered that the Appellee, Panhandle Eastern Pipe Line Company pay all costs in this

behalf expended, both in this Court and in the court below, and that this decision be certified below for observance.

[fol. 63]

No. A-4089

IN THE SUPREME COURT OF TEXAS

PANHANDLE EASTERN PIPE LINE COMPANY, Petitioner

vs.

ROBERT S. CALVERT, et al., Respondents

MICHIGAN-WISCONSIN PIPE LINE COMPANY, Petitioner

vs.

ROBERT S. CALVERT, et al., Respondents

AMARILLO OIL COMPANY, Petitioner

vs.

ROBERT S. CALVERT, et al., Respondents

APPLICATION FOR WRIT OF ERROR

To the Honorable Supreme Court of Texas:

I

STATEMENT OF THE NATURE AND RESULT OF THE CASE

By separate suits against the proper State officers, filed in the 126th Judicial District of Texas (Travis County), Panhandle Eastern Pipe Line Company, Michigan-Wisconsin Pipe Line Company and Amarillo Oil Company (petitioners herein) * challenged the validity, as applied to them, respectively, of Subdivision XXIII of H. B. 285, Chapter 402, p. 740, Acts of the 52nd Legislature, V.A.C.S., Art. 7057(f). The suits were instituted under

* Such petitioners will be referred to herein as Panhandle, Michigan-Wisconsin and Amarillo, respectively.

V.A.C.S., Art. 7057(b) for recovery of taxes paid under protest. Petitioners attacked such subdivision on the ground that, as applied to them, such subdivision is violative of the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States.

Hon. Jack Roberts, Judge of the District Court, held such subdivision of H. B. 285 invalid, as applied to petitioners. Thereupon, respondents filed separate appeals in the Court of Civil Appeals for the Third Supreme Judicial District at Austin, such appeals being docketed as Causes Nos. 10,116, 10,117 and 10,118, respectively.

In the Court of Civil Appeals, Causes Nos. 10,116, 10,117, and 10,118 were consolidated for hearing and argument. On February 4, 1953, that Court entered judgments in each of such causes, reversing the judgments of the District Court, and ordering that the respective plaintiffs take nothing. A single opinion was written covering the three cases. On February 25, 1953, motion for rehearing therefore seasonably filed in each of such cases was overruled.

An application for writ of error is applied for by Panhandle Eastern Pipe Line Company, Appellee in Cause No. 10,116 in such Court of Civil Appeals, Michigan-Wisconsin Pipe Line Company, Appellee in Cause No. 10,117 in that Court, and Amarillo Oil Company, Appellee in Cause No. 10,118 in that Court. For the convenience of the Court, the applications are identical in form and content, but are separately filed in each case.

[fol. 65]

II

Statement of Jurisdiction

The Supreme Court has jurisdiction hereof under Subdivisions 3, 4 and 6 of Article 1728 of the statutes.

III

Points of Error

1. The Court erred in holding that Article 7057f, V.A.C.S., as applied to the activities of Petitioners Michigan-Wisconsin and Panhandle in taking and retaining gas at the outlets of gasoline plants for transmission in interstate com-

merce, is not violative of Article I, Section 8, Clause 3 (Commerce Clause) of the Constitution of the United States in that:

(a) Such Article imposes a tax for the privilege of engaging in interstate commerce;

(b) It is a tax upon the privilege of engaging in the business of taking and transporting gas in interstate commerce;

(c) It is a tax upon the purchase and receipt of gas for immediate and continued transportation in interstate commerce; and

(d) It is an unconstitutional interference with and regulation of interstate commerce by the State of Texas—a tax upon interstate commerce itself.

2. The Court erred in failing and refusing to hold that the residue gas taken or retained at the outlets of gasoline plants by Michigan-Wisconsin and Panhandle is in interstate commerce prior to or simultaneously with the taking or retaining thereof by such companies.

3. The Court erred in holding that the activities of Michigan-Wisconsin and Panhandle sought to be taxed by Article 7057f, V.A.C.S., are local activities which are not so closely [fol. 66] related to and such an integral part of the interstate business of such companies as to be within the scope of the Commerce Clause of the Constitution of the United States.

4. The Court erred in holding that the gas received by Michigan-Wisconsin at the outlet of the processing plant is subjected to "further processing done by Michigan-Wisconsin in the State of Texas."

5. The Court erred in holding that, as applied to Michigan-Wisconsin, the incidence of the tax imposed by Article 7057f, V.A.C.S., occurs "prior to the time that the gas is finally committed to its interstate journey," and in applying such holding to Panhandle.

6. The Court erred in holding, if it did so hold, that the tax imposed upon Michigan-Wisconsin and Panhandle by Article 7057f, V.A.C.S., is rendered constitutional by any supposed benefits or protection conferred upon such companies by the conservation laws of this State.

7. The Court erred in holding that Amarillo is subject to the tax imposed upon its activities by Article 7057f, V.A.C.S., since, as such Article is unconstitutional as to gas "gathered" for interstate transmission, Section 11 of such Article specifically declares that in such event "the tax shall not be levied as to gas gathered for intrastate consumption."

8. The Court erred in holding that Panhandle is subject to a tax imposed on its activities by Article 7057f, V.A.C.S., **in receiving or retaining gas** at the outlets of gasoline plants for intrastate consumption as Section 11 of such Article specifically provides that if the tax is unconstitutional or invalid as to "gas gathered for interstate transmission, the tax shall not be levied as to gas gathered for intrastate consumption." *

[fol. 67]

IN THE SUPREME COURT OF TEXAS

No. 4089

From Travis County, Third District

MICHIGAN-WISCONSIN PIPE LINE Co.,

vs.

ROBERT S. CALVERT, et al.

ORDER REFUSING WRIT OF ERROR—May 6, 1953

This day came on to be heard the application of petitioner for a writ of error to the Court of Civil Appeals for the Third District and the same having been duly considered, it is ordered that the application be refused; that the applicant, Michigan-Wisconsin Pipe Line Company pay all costs incurred on this application.

* Each of the foregoing points of error is either verbatim with, or germane to, the assignments of error contained in petitioners' motions for rehearing in the Court of Civil Appeals.

IN SUPREME COURT OF TEXAS

(No. A-4089)

ORDER OVERRULING MOTION FOR REHEARING—June 3, 1953

The motion for rehearing having heretofore been submitted to the Court and after due consideration of same, it is ordered that the said motion be, and is hereby, overruled.

[fol. 68] IN THE SUPREME COURT OF TEXAS

No. A-4088

From Travis County, Third District

PANHANDLE EASTERN PIPE LINE Co.,

vs.

ROBERT S. CALVERT et al.,

ORDER REFUSING WRIT OF ERROR—May 6, 1953

This day came on to be heard the application of petitioner for a writ of error to the Court of Civil Appeals for the Third District and the same having been duly considered, it is ordered that the application be refused; that the applicant, Panhandle Eastern Pipe Line Company, pay all costs incurred on this application.

IN SUPREME COURT OF TEXAS

(No. A-4088)

ORDER OVERRULING MOTION FOR REHEARING—June 3, 1953

The motion for rehearing herein having heretofore been submitted to the Court and after due consideration of same, it is ordered that the said motion be, and is hereby, overruled.

[fol. 69] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. —

MICHIGAN-WISCONSIN PIPE LINE COMPANY, Appellant

v.

ROBERT S. CALVERT, et al., Appellees

STIPULATION RELATIVE TO THE STATUS OF THE AMARILLO OIL
COMPANY CASE—Filed in Court of Civil Appeals—July
22, 1953

For the information of the Court, and at the request
of the appellee herein, the parties to this appeal have
entered into the following stipulation:

(a) The statute involved in this appeal, Article 7057f
of Vernon's Annotated Civil Statutes of Texas, by its ex-
press terms and as construed and applied by appellees,
imposes a tax upon gas which is "gathered" (within the
statutory definition of such term) for transmission in intra-
state commerce, as well as upon gas which is "gathered"
for transmission to markets in other states.

(b) Section 11 of the statute provides as follows:

"In the event the tax levied by this [statute] is de-
clared unconstitutional or invalid by a court of com-
petent jurisdiction as to gas gathered for interstate
[fol. 70] transmission, the tax shall not be levied as to
gas gathered for intrastate consumption."

(c) Amarillo Oil Company is a pipeline company which
transports gas only in intrastate commerce within the
State of Texas; it pays a "gathering" tax under Article
7057f; and the gas with respect to which such tax is paid
moves only in intrastate commerce within the State of
Texas.

(d) Amarillo Oil Company has instituted suit in the
appropriate court of the State of Texas for the recovery
of taxes paid by it under Article 7057f, alleging in its suit
that the tax levied by the statute is unconstitutional under

the Commerce Clause with respect to gas moving in interstate commerce; and, hence, that under Section 11 of the statute, the tax cannot be applied to gas which it moves in intrastate commerce.

(e) Throughout the history of the litigation concerning Article 7057f in the courts of the State of Texas, the suit filed by Amarillo Oil Company, the suit filed by Michigan-Wisconsin Pipe Line Company, and the suit filed by Panhandle Eastern Pipe Line Company have been tried, briefed and argued together, although separate records have been made in each case and the cases have never actually been consolidated.

(f) Since the gas "gathered" by Amarillo Oil Company moves only in intrastate commerce, and since Amarillo Oil Company is placing its reliance upon Section 11 of Article 7057f, Amarillo Oil Company has requested the Supreme Court of Texas to retain jurisdiction over its case, and to take no final action in such case until this Honorable Court makes a final disposition of the appeals by Michigan-Wisconsin and Panhandle Eastern.

(g) As a result of such request, the Supreme Court of Texas is retaining jurisdiction over the Amarillo Oil Company case, by withholding action upon the motion for re-[fol. 71] rehearing which has been filed in such case; and the disposition which this Honorable Court makes with respect to the Michigan-Wisconsin and Panhandle Eastern cases will be determinative of the action which the Supreme Court of Texas will take with respect to the Amarillo Oil Company case.

In testimony whereof, this stipulation is, on this the 21st day of July, 1953, executed by an attorney of record for each of the parties in this cause.

John Ben Shepperd, W. V. Geppert, Attorneys for Appellees.

R. Dean Moorhead, An Attorney for Appellant.

[fol. 71b] IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS,
126th JUDICIAL DISTRICT

No. 91,332

PANHANDLE EASTERN PIPE LINE COMPANY

vs.

ROBERT S. CALVERT, et al

STATEMENT OF FACTS

Before

Honorable Jack Roberts, Judge

APPEARANCES

Honorable Everett L. Looney, Honorable Edward Clark
both of Austin, Texas.

Honorable D. H. Culton, of Amarillo, Texas.

Honorable Charles I. Francis, Honorable Gene Woodfin,
both of Houston, Texas.

Attorneys for Plaintiff.

Honorable Price Daniel, Attorney General of Texas.

Honorable Charles D. Mathews, First Assistant Attorney General.

Honorable W. V. Geppert, Assistant Attorney General.

Honorable C. K. Richards, Assistant Attorney General.

Honorable E. Wayne Thode, Assistant Attorney General.

Attorneys for Defendants.

[fol. 72] Morning Session, May 13, 1952

Mr. Looney: Your Honor, the Plaintiff wishes to offer in evidence a portion of the Stipulations that were worked out and have been signed, and have they been filed?

General Daniel: Not yet.

Mr. Looney: Let's file the original. We can file that, and the file mark can be put on later, Your Honor, the Stipulation being No. 91,332, Panhandle Eastern Pipe Line Company and others against Robert S. Calvert, et al, in the 126th District Court of Travis County, Texas. Here is the Stipulation, Your Honor:

"For the purpose of facilitating the trial of this cause only and preventing unnecessary costs in adducing the

evidence herein, the parties hereto through their attorneys of record hereby stipulate that qualified witnesses who could and would be present on the trial hereof would summarize the documentary evidence hereinafter referred to and orally testify that:"

Mr. Looney: Now, the concluding paragraph of the Stipulation is:

"The above evidence may be considered by the court for all purposes, subject to proper objections as to materiality and relevancy, as if actually adduced under oath from the witness stand on the trial hereof."

[fol. 73] And the stipulation was dated this the 12th day of May, 1952.

General Daniel: You might state to the Court that either side, of course, has the right to introduce other evidence.

Mr. Looney: Oh, yes, that is correct. Now, Your Honor, we would like to file with the Clerk the executed Stipulation—this was just finished this morning, this particular stipulation in this particular case, and we will want to withdraw it, with approval of the Court, for duplication, so that we can circulate it among certain of the other Counsel who are interested.

The Court: All right, sir.

Mr. Looney: We will file this stipulation. We offer in evidence Paragraph I of the Stipulation, which is, and I would like for the Reporter to put these in so that they will be in the Statement of Facts:

"Plaintiff is a corporation, incorporated under the laws of the State of Delaware. Defendant Robert S. Calvert is Comptroller of Public Accounts of the State of Texas; defendant Price Daniel is Attorney General of the State of Texas; and defendant Jesse James is State Treasurer of the State of Texas. Defendants are sued in their respective official capacities in accordance with the provisions of V.A.C.S. 7057b, Acts of the 43rd Legislative of Texas, Chapter 214, as amended."

[fol. 74] Mr. Looney: We next offer in evidence out of the Stipulation referred to Paragraph II.

"This suit is brought under said V.A.C.S. 7057b (being the Acts of the 43rd Legislature of Texas, Chapter 214, as amended) seeking a determination that Section XXIII of H. B. 285, Chapter 402, page 740, Acts of the 52nd Legislature of the State of Texas, effective September 1, 1951, is invalid on its face and as interpreted by defendants, insofar as it applies to plaintiff's operations, and seeking the recovery of moneys heretofore paid under protest by plaintiff and moneys that will be so paid during the pendency of this suit under the requirements of defendant Robert S. Calvert, plus interest thereon as provided in said V.A.C.S. 7057b."

Mr. Looney: We next offer in evidence out of the Stipulation Paragraph III:

"Plaintiff is a natural gas company within the definition of that term contained in the Natural Gas Act of 1938, as amended, and holds certificate of convenience and necessity issued by the Federal Power Commission under which it is authorized to transport in interstate commerce and to sell in interstate commerce gas received into its line for such transportation and sale. It holds a permit to do business in Texas as a foreign corporation."

Mr. Looney: We next offer in evidence the whole of Paragraph IV:

[fol. 75] "'Natural gas,' as that term is used herein, refers to gas as produced from the wells referred to. 'Residue gas,' as used herein, refers to the gas remaining from such natural gas after certain liquefiable hydrocarbons have been removed therefrom and after desulphurization, if any.

"Natural gas in going through a gasoline plant or other process to separate oil, gasoline or other liquid hydrocarbons or to extract hydrogen sulphide or carbon dioxide or any other element undergoes certain changes, both in quality and quantity. Among the changes are these: The residue gas leaving the extraction or separating device is usually at a lower pressure, the temperature is sometimes higher, and the specific gravity of the gas is less than that of the natural gas which enters such plant. There are

differences between the proportion of the methane content, the ethane content and the content of other hydrocarbons. Likewise, when the hydrogen sulphide or carbon dioxide are extracted, there is a percentage variance in the constituents remaining in the gas. In addition to these changes in constituents, the volume of the residue gas is less than the volume of the natural gas which enters the extraction plant due to the removal of some of the constituents of the natural gas."

Mr. Looney: We offer next from the Stipulation Paragraph V:

"The only sales of gas made by plaintiff in Texas are [fol. 76] from its gathering line to a carbon black company and two other customers, all of whom are listed in paragraph VIII hereof, and the following sales along its main line interstate pipeline transportation system: (1) to Southwestern Public Service Company for distribution in Gruver, Texas, an approximate daily average of 123.28 MCF during the year; (2) to three taps for gas used in irrigation daily average during the year of 17.7 MCF; (3) to New Hope school in Hansford County, Texas, a daily average during the year of .5 MCF; (4) to farm taps (a part of the consideration for rights-of-way), a daily average during the year of 4.82 MCF. The total volumes of gas so sold in Texas from such main line, aggregating 146.3 MCF daily, represent 36/100 of 1% of the total volumes of residue gas (405 million cubic feet) and 46/100 of 1% of the residue from Texas produced gas which is so taken and received into such main line daily. Other than the sales above referred to in Texas, its southernmost sale is at Kismet, Kansas. It owns and operates (except for a distance of approximately 70 miles which is a single line only) a dual or triple natural gas pipeline system consisting principally of 20 inch, 22 inch, 24 inch, 26 inch and 30 inch pipeline, with 18 compressor stations, utilizing approximately 288,600 horse power and other necessary facilities."

Mr. Looney: We next offer in evidence from the Stipulation Paragraph VI:

[fol. 77] "Plaintiff's main pipeline originates at what is generally referred to as Panhandle's Sneed Compressor

Station (south of which it has certain gathering lines hereinafter referred to), near the east boundary of Moore County, Texas, and extends therefrom through the states of Texas, Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio, and has its northern termini in the State of Michigan. The designed sales capacity of plaintiff's system, as constructed, is approximately 850 million cubic feet of gas daily, varying slightly with temperature conditions as between winter and summer months and seasonal demands. The principal markets served by plaintiff include gas distribution companies and industrial consumers in the states referred to. The total population of the consuming markets to which gas is supplied by plaintiff is estimated at approximately 7½ million people."

Mr. Looney: We next offer in evidence from the Stipulation Paragraph VII:

"To provide a portion of the gas required for plaintiff's markets, it owns gas leases covering approximately 43,584 acres of land in the Panhandle Field of Texas, which leases are in Carson, Hutchinson, Moore and Potter Counties. On these leases it has 76 producing gas wells. The gas required for plaintiff's markets, over and above that which is produced from plaintiff's such Texas wells is, in part, purchased from other producers in Texas, Oklahoma and Kansas and, in part, produced from Panhandle's wells in Oklahoma and Kansas."

[fol. 78] Mr. Looney: We next offer from the Stipulation Paragraph VIII:

"Plaintiff also owns and operates in Texas a system of gathering lines (as that term is consistently used in the gas industry and in ordinary usage) for the purpose of gathering natural gas (within the meaning of that term as it is consistently used in the gas industry and in ordinary usage) produced from its wells and natural gas acquired by it from certain other producers of gas in the Panhandle Field. This system consists of two arms, the North Field arm and the South Field arm. One section of the North Field arm, into which the natural gas from 20 wells is so collected, is operationally disconnected from the rest of

the system and all the gas which is collected in that section is delivered by plaintiff therefrom to Continental Carbon Company for carbon black manufacture. Plaintiff also delivers from the main system of gathering lines to the Skelly School in Moore County an average of approximately 6 MCF daily and to E. B. Dulaney in Moore County approximately 23 MCF daily. A map showing such system of gathering lines accompanies this Stipulation as Exhibit "A".

Mr. Looney: I would like to have Exhibit "A" marked and offered in evidence. We offer Exhibit "A" in evidence.

(Said instrument was admitted in evidence as Plaintiff's Exhibit "A" and the same is shown herein at Volume II.)

Mr. Looney: We next offer Paragraph IX:

[fol.79] "The volumes of natural gas so collected by plaintiff through such gathering system (including the natural gas produced from plaintiff's wells and the natural gas acquired by plaintiff from other producers) which are not required for the sales referred to in the preceding paragraph flows from both arms of such gathering system into plaintiff's Sneed Compressor Station where such natural gas is compressed. From such compressor station such compressed gas flows into a gasoline plant owned and operated by Phillips Petroleum Company, which is located adjacent to Panhandle's Sneed Compressor Station, and commonly called Phillips' Sneed Gasoline Plant."

Mr. Looney: We next offer from the Stipulation Paragraph X:

"The natural gas which thus flows from plaintiff's gathering system into plaintiff's Sneed Compressor Station contains, when produced, substantial quantities of liquefiable hydrocarbons and, under contract between plaintiff and Phillips, dated May 25, 1943, as amended, such natural gas is processed by Phillips in such gasoline plant for the removal of such liquifiable hydrocarbons, and the residue gas therefrom goes directly from the outlet of such gasoline

plant into plaintiff's main line, in the manner hereinafter detailed, for transportation to plaintiff's markets. A copy of the contract under which such natural gas is processed [fol. 80] Mr. Looney: We would like to have the Reporter mark the contract as Plaintiff's Exhibit "B" and offer it in evidence.

(Said instrument was marked for identification as Plaintiff's Exhibit "B", and the same is shown herein at Volume II.)

Mr. Looney: We next offer from the Stipulation Paragraph XI:

"In addition to the residue gas from the natural gas which goes from plaintiff's gathering system into plaintiff's compressor station at Sneed, plaintiff also acquires and takes into its main line for transportation to its markets outside the State of Texas residue gas from three other sources. All of such gas so acquired is residue from natural gas which, when produced, contains substantial quantities of liquefiable hydrocarbons extractable in liquid form, and such natural gas is processed in gasoline plants in Texas for removal of such liquid hydrocarbons before the residue gas is received into plaintiff's main pipeline. The details as to such sources of residue gas are set forth in the next succeeding paragraphs herein."

Mr. Looney: Plaintiff now offers in evidence from the Stipulation Paragraph XII:

"Phillips Petroleum Company (Phillips) produces in Texas and purchases certain natural gas produced in Texas and collects such gas through its gathering system (within [fol. 81] the meaning of that term as it is consistently used in the gas industry and in ordinary usage) and delivers a portion thereof into plaintiff's Sneed Compressor Station where such gas, along with the natural gas which enters such compressor station from plaintiff's gathering system is compressed. After such compression, the commingled gas flows into Phillips' gasoline plant near Panhandle's Sneed Compressor Station. After the liquefiable hydrocarbons are removed in such gasoline plant of Phillips, the residue gas from such commingled gas flows into plaintiff's main

line, at the outlet of Phillips' Sneed gasoline plant. A copy of the contract for such purchase between Panhandle and Phillips, called 'Supplemental Contract,' dated April 5, 1943, and of a supplement dated April 25, 1944, accompanies this Stipulation as Exhibit 'C'."

Mr. Looney: I would like to get the Reporter to mark that as Exhibit "C", and offer it in evidence as such.

(Said instruments were marked for identification and admitted in evidence as Plaintiff's Exhibits "C-1" and "C-2", and the same are shown herein at Volume II.)

Mr. Looney: We next offer in evidence from the Stipulation Paragraph XIII:

"Plaintiff also purchases from Skelly Oil Company at the outlet of the Phillips gasoline plant at Sneed approximately 10 million cubic feet daily of residue gas from natural gas produced in Texas. The natural gas of which such gas is [fol. 82] originally a constituent flows through plaintiff's gathering and compressing facilities into the Phillips Sneed gasoline plant, and Panhandle 'takes' such residue within the meaning of H. B. 285, at the outlet of such gasoline plant after Phillips has extracted liquefiable hydrocarbons from such natural gas. A copy of the contract between Skelly and plaintiff under which such purchase is made accompanies this Stipulation as Exhibit 'D'."

Mr. Looney: We ask the Reporter to mark that contract Exhibit "D" and offer it in evidence.

(Said instrument was admitted in evidence as Plaintiff's Exhibit "D", and the same is shown herein at Volume II.)

Mr. Looney: The Plaintiff next offers in evidence from the Stipulation Paragraph XIV:

"Approximately 210 million cubic feet of residue gas (at 14.65 p. s. i.) ordinarily flows from Phillips Sneed gasoline plant into plaintiff's main line daily at such outlet of the Phillips Sneed gasoline plant. Of this, approximately 70 per cent is the residue from the natural gas which belongs to plaintiff when it flows into plaintiff's compressor station, and approximately 30 per cent represents the residue from the natural gas belonging to Phillips and Skelly which flows

into such compressor station and which is purchased by plaintiff from Phillips and Skelly, respectively. Such 70 per cent is gas of which possession is 'retained' by plaintiff and such 30 per cent is gas of which possession is 'taken' by [fol. 83] plaintiff at the outlet of such gasoline plant within the meaning of such Section XXIII of H. B. 285."

Mr. Looney: Plaintiff now offers in evidence from the Stipulation Paragraph XV:

"Panhandle purchases from Shamrock Oil and Gas Corporation (Shamrock) and from Magnolia Petroleum Company an aggregate of approximately 100 million cubic feet daily of residue gas at the outlet of Shamrock's McKee gasoline plant in Moore County, Texas. The natural gas, of which such residue gas is originally a constituent, is produced in Texas and contains, when produced a substantial quantity of liquefiable hydrocarbons. Such gas is processed through such McKee gasoline plant in Texas for the removal of gasoline and other liquefiable hydrocarbons. The residue gas so received by plaintiff at the outlet of such gasoline plant is 'taken' by plaintiff (as that term is used in H. B. 285) at such outlet and then flows into plaintiff's main pipeline through plaintiff's 18-inch line, entering such main pipeline at a point east of plaintiff's Hansford Compressor Station in Hansford County, Texas. A copy of the contracts between plaintiff and Shamrock and Magnolia, respectively, under which such purchases are made accompanies this Stipulation as Exhibits 'E' and 'F', respectively."

Mr. Looney: We ask that the Shamrock contract be marked as Plaintiff's Exhibit "E", and we offer it in evidence as such.

[fol. 84] (Said instrument was admitted in evidence as Plaintiff's Exhibit No. "E", and the same is shown herein at Volume II.)

Mr. Looney: And the contract between Plaintiff and the Magnolia Petroleum Company, we will ask the Reporter to mark as Plaintiff's Exhibit "F", and offer it in evidence.

(Said instrument was admitted in evidence as Plaintiff's Exhibit "F", and the same is shown herein at Volume II.)

Mr. Looney: Plaintiff now offers in evidence from the Stipulation Paragraph XVI:

"Plaintiff purchases from Phillips approximately 95 million cubic feet daily (14.65 p. s. i.) of residue gas at the outlet of Phillips' Hansford gasoline plant in Hansford County, Texas. Of the natural gas, of which such residue gas is originally a constituent, approximately 40 to 45 per cent is produced in Texas and approximately 55 to 60 per cent is produced in Oklahoma. The gas so delivered to plaintiff by Phillips at such outlet of such gasoline plant is residue from natural gas produced by Phillips from gas reserves committed to plaintiff under a long term contract or purchased by Phillips from other producers, which natural gas is produced from gas reserves which are contracted to Phillips and in turn contracted by Phillips to plaintiff under a long term contract. Phillips retains the right and has the obligation to remove liquefiable hydrocarbons from such gas so long as the heating value thereof is not reduced below the specifications set forth in the contract. A true copy of such contract and an amendment [fol. 85] thereto of April 24, 1944, accompany this Stipulation as Exhibit 'G.'

Mr. Looney: We ask the Reporter to mark that contract as Plaintiff's Exhibit "G", and we offer it in evidence.

(Said instrument was admitted in evidence as Plaintiff's Exhibit "G", and the same is shown herein at Volume II.)

"After such natural gas is produced, either by Phillips or by other producers, it is gathered (within the meaning of that term as it is consistently used in the gas industry and ordinary usage) by Phillips through an extensive gathering system covering many wells, both in Texas and in Oklahoma. A portion of such natural gas when produced or purchased and gathered by Phillips contains sulphur or sulphur compounds which are objectionable and are removed by Phillips through a desulphurization process. All of such natural gas when so produced and gathered contains liquefiable hydrocarbons. Before the residue gas therefrom is delivered to plaintiff by Phillips the natural gas first flows through a compressor station owned by plaintiff and situated at the intake side of Phillips Hans-

ford gasoline plant where such natural gas is compressed for the convenience of Phillips in extracting liquefiable hydrocarbons therefrom and for convenience of plaintiff in the movement of such gas from Phillips' said Hansford gasoline plant to plaintiff's markets. After such natural gas is so compressed in plaintiff's compressor station, such compressed natural gas flows from such compressor station [fol. 86] of plaintiff into Phillips' said Hansford gasoline plant where liquefiable hydrocarbons are extracted pursuant to Phillips' rights and obligations under such contract. Thereupon, the residue gas flows from the outlet of such gasoline plant into plaintiff's 18-inch line (and is taken or retained by plaintiff as those terms are used in H. B. 285) and thence continues its flow through such 18-inch line and plaintiff's main pipeline facilities to the markets of plaintiff."

Mr. Looney: We next offer in evidence Paragraph XVII:

"At all times during and after the gathering by plaintiff of the natural gas which enters plaintiff's Sneed Compressor Station from plaintiff's said gathering system, the residue gas constituent thereof, except for such quantities as may be included within the sales within the State of Texas (set forth in paragraph V hereof), is destined for transportation by plaintiff to points in other states; at all times during and after the gathering by Phillips of the natural gas which enters Phillips' Hansford gasoline plant and during and after the gathering by Shamrock of the natural gas which enters the McKee gasoline plant, the residue constituent of such natural gas as is purchased under contracts by plaintiff with Phillips, Shamrock and Magnolia, respectively, is committed by contract to sale and delivery to plaintiff for transportation to points in other states in accordance with the contracts hereinabove referred to (except such portions of residue gas as may be sold within the State of Texas as set forth above in Paragraph V hereof). Likewise, the residue from the natural gas which enters plaintiff's Sneed Compressor Station from the Phillips gathering system is committed by contract to sale and delivery to plaintiff for transportation to other states (except such portions of such residue gas as may be sold within

the State of Texas) from the time such natural gas enters such compressor station."

Mr. Looney: Plaintiff now offers in evidence from the Stipulation Paragraph XVIII:

"The following statement sets forth the details of the flow of gas through the gasoline plants at which plaintiff takes and retains residue gas as set forth in paragraphs VII to XVII hereof, namely, the Phillips-Sneed gasoline extraction plant, located in Moore County, Texas, the Phillips-Hansford gasoline extraction plant, in Hansford County, Texas, and the Shamrock-McKee gasoline extraction plant, in Moore County, Texas.

"A. The Sneed Gasoline Plant.

"The gas produced in Texas, possession of which is taken and retained by plaintiff at the outlet of the Phillips-Sneed gasoline plant in Moore County, Texas, is the residue from natural gas:

"(a) Produced by plaintiff and gas purchased by plaintiff from other producers along its gathering system and not sold from such gathering system as set forth in paragraph [fol. 88] graph VIII hereof.

"(b) Produced by Phillips or purchased by Phillips from other producers and sold by Phillips to plaintiff, as set forth in paragraph XII hereof, and delivered by Phillips into plaintiff's Sneed Compressor Station adjacent to the Phillips Sneed gasoline plant in Moore County, Texas.

"(c) Produced in Texas by Skelly Oil Company or purchased by Skelly from other producers who produce such gas in Texas, and delivered into the facilities of plaintiff at a point a short distance out of plaintiff's Sneed Compressor Station as set forth in paragraph XIII hereof and moving in a common stream with plaintiff's gas through plaintiff's compressor station and Phillips' gasoline plant at Sneed.

"Exhibit 'H' accompanying this Stipulation is a schematic sketch or layout showing the flow of all of such gas to and through plaintiff's Sneed Compressor Station and through Phillips' nearby gasoline plant into plaintiff's main line facilities."

Mr. Looney: We ask the Reporter to mark the schematic sketch as Plaintiff's Exhibit "H", and offer it in evidence.

(Said instrument was admitted in evidence as Plaintiff's Exhibit "H", and the same is shown herein at Volume II.)

"As shown on such Exhibit 'H', natural gas flows from plaintiff's gathering system into plaintiff's Sneed Compressor Station. Such natural gas includes not only the natural gas produced and purchased by plaintiff and flowing from points of production or purchase through plaintiff's gathering system, but also the natural gas, residue from which is purchased by plaintiff from Skelly Oil Company. Such natural gas is under agreement between plaintiff and Phillips, processed by Phillips under its contract with plaintiff for the extraction of liquid hydrocarbons before the residue is taken by plaintiff into plaintiff's main line at the outlet of the Phillips gasoline plant.

"The residue gas sold by Phillips to plaintiff at Sneed is residue from natural gas produced by Phillips or purchased from other producers, and is produced from wells in Moore, Hutchinson and Hartley Counties, Texas. Such natural gas is gathered by Phillips in its gathering system (as that term is consistently used in the gas industry and in ordinary usage). It flows through a number of gathering lines which connect the wells with Lines A and G shown on such sketch, and thence flows to the Sneed Plant, all of such lines being owned and operated by Phillips. A map of Phillips' said gathering system is attached hereto as Exhibit 'J-1'.

"Thence, the natural gas so delivered by Phillips into such plant flows through a bank of two scrubbers in its Sneed plant and into a compressor building containing 11 compressors. There the pressure is raised in the course of the flow from about 160 pounds to about 300 pounds per [fol. 90] square inch. Such natural gas then flows to a gas treater where the hydrogen sulphide content is reduced in conformity with requirements of the sale contract between Phillips and plaintiff. It then flows to a meter run of 3 sales meters where the volume of gas sold to plaintiff is measured. By a line, 20 inches in diameter, this gas moves to the fence between the Phillips Sneed plant and plaintiff's Sneed Compressor Station where it flows into Panhandle's connecting line 24 inches in diameter. At this point plaintiff has con-

tracted for title to such gas, subject to Phillips' contractual right and obligation to extract and retain the liquid hydrocarbons thereafter to be removed by Phillips from the raw gas and its obligation to deliver the residue therefrom to plaintiff at the outlet of the Phillips Sneed gasoline plant.

"The natural gas so delivered by Phillips to plaintiff at such compressor station is commingled by plaintiff with the gas which plaintiff has produced or purchased from others and brought to such compressor station. The commingled gas then flows through plaintiff's compressor station where, during the course of the flow, the pressure is increased to about 550 pounds per square inch. In plaintiff's compressor station the natural gas is compressed and cooled during the course of the flow through the station. After such compression, such commingled gas flows through a line 24 inches in diameter, owned and operated by plaintiff, to a fence dividing the two plants, and there into a similar line owned and [fol. 91] operated by Phillips leading into Phillips' gasoline plant.

"At such Phillips' gasoline plant, such gas flows to a bank of 6 absorbers where certain of the gasoline and other liquefiable hydrocarbons are extracted during the course of flow by Phillips. Thereafter, the residue gas flows through a line 24 inches in diameter to the Phillips-Sneed gasoline plant fence where possession of such residue is taken or retained by plaintiff at the inlet to plaintiff's main transportation pipeline.

"From such point of connection with the outlet of the Phillips-Sneed gasoline plant, plaintiff owns and operates a natural gas pipeline system extending through the states of Oklahoma, Kansas, Missouri, Illinois, Indiana, Ohio and into Michigan. By means of this system, plaintiff transports residue gas purchased from Phillips, residue gas purchased from other producers and residue from natural gas produced by itself and from natural gas purchased from other producers for sale for ultimate public consumption for domestic, commercial and industrial uses in the states of Texas, Oklahoma, Kansas, Missouri, Illinois, Indiana, Ohio and Michigan and in Canada.

"It is common practice by many pipeline companies to cool gas after it has gone through compressor units. The cooling, in such cases, makes it possible for the gas to be

transported more economically than otherwise. Whether or not it is cooled after passing through compressors depends primarily on the ratio of compression used in a particular station by the company operating it. In the course [fol. 92] of movement of the gas through compressor units and connecting facilities, compressor oil and other substances frequently become entrained in the gas stream, and it is advisable to remove such substances therefrom. For this purpose, several methods are used by different companies in different compressor stations. In some instances a type of separate scrubbers is used, in others scrubbers are used in connection with dehydrators and in other instances drips are used.

"In the Panhandle Sneed Compressor Station, Panhandle cools the gas after it has passed through the compressors and before it enters the Phillips gasoline plant but does not provide scrubbers or other facilities for taking out entrained liquids prior to extraction by Phillips of the liquefiable hydrocarbons since the compressed gas is to go through Phillips' gasoline plant prior to the time the residue gas goes into Panhandle's main pipeline. However, the absorbers in the Phillips' Sneed gasoline plant are equipped with scrubbers which perform that function. After the residue gas is delivered by Phillips to Panhandle, Panhandle dehydrates the same. The dehydrator is equipped with a scrubber section which removes entrained liquids from the gas stream. In the compressor plant of Panhandle, the natural gas is compressed and cooled and the residue gas is dehydrated and scrubbed through the use of the scrubber section with which such dehydrator is equipped.

"The movement of such residue gas from the wells where [fol. 93] produced, through such Panhandle Sneed Compressor Station and such Phillips' gasoline plant to such point of 'taking' or 'retaining' for transportation by plaintiff at the outlet of the Phillips Sneed gasoline plant, and thence through plaintiff's gas pipeline system to its customers in Texas and other states, is a steady and continuous flow of such gas in the manner detailed above. The taking or retaining of such residue gas at the outlet of Phillips' gasoline plant is accomplished through facilities owned by

plaintiff that are used exclusively in connection with such taking, such retaining and such transportation."

(Thereupon, Court was recessed until 2:00 P. M., May 12, 1952, at which time the proceedings were resumed as follows:)

Afternoon Session, May 12, 1952

Mr. Looney: We are continuing with Paragraph XVIII of the Stipulation, Sub-section B:

"B. The Phillips-Hansford Gasoline Plant

"Phillips sells to plaintiff residue gas under a contract (Exhibit 'G') covering about 175,000 acres of leases owned by Phillips in portions of the South Hugoton Field in Sherman and Hansford Counties, in Texas, and in Texas County, Oklahoma. The natural gas produced from such reserves is gathered (within the meaning of that term as it is customarily used in the gas industry and in ordinary usage) by [fol. 94] Phillips through an extensive gathering system which connects to 262 wells. Through such system gas flows to Phillips' Hansford gasoline plant. 257 of such wells produce sweet gas and five produce sour gas as defined by Texas law. The wellhead pressure varies from slightly less than 280 pounds to approximately 350 pounds per square inch. Until September 19, 1951, the gas so gathered by Phillips flowed directly from such gathering system into Phillips' Hansford gasoline plant without compression, but, effective about September 19, 1951, a compressor station was constructed by plaintiff at a point adjoining such Phillips' Hansford gasoline plant, and since that date the pressure of such gas has been increased by plaintiff during the course of the flow from such gathering system into the Phillips' Hansford gasoline plant.

Mr. Looney: We ask the Reporter to mark the schematic layout just handed to the Reporter by Mr. Culton as Plaintiff's Exhibit "I", and we introduce it in evidence at this point.

(Said instrument was admitted in evidence as Plaintiff's Exhibit "I", and the same is shown herein at Volume II.)

"Exhibit 'I' accompanying this Stipulation is a schematic layout showing the flow of such gas from such gathering system to and through plaintiff's said compressor station and Phillips' Hansford gasoline plant since September 19, 1951. The gas produced by Phillips or purchased by Phillips from other producers from said wells flows from such wells to the site of the Phillips' Hansford gasoline [fol. 95] plant and plaintiff's said compressor station through a series of gathering lines (as that term is consistently used in the gas industry and in ordinary usage) which connect into Lines A, B, C, D, E and F, shown on such schematic layout or sketch. Natural gas from wells in Texas County, Oklahoma, flows into Lines A, B, C, D, E and F, all of which increase in diameter as they near the site where the diameter of Line a is 20 inches and that of each of the others is 16 inches. Lines A and B lie wholly within the State of Texas, but are connected with lines bringing gas from wells located in Texas County, Oklahoma. Throughout most of their lengths Lines D, E and F lie in the State of Oklahoma and are connected with gathering lines bringing gas from wells within that state only.

"Natural gas from wells in Sherman and Hansford Counties, Texas, flows into Lines A and B and into a third line, C, which is 16 inches in diameter, at the Hansford Plant enclosure. Line C lies wholly within the State of Texas, as do all wells connected with it. A map of Phillips' said gathering system accompanies this Stipulation as Exhibit 'J'."

Mr. Looney: We will ask the Reporter to mark the map just handed him as Plaintiff's Exhibit "J", and we offer it in evidence at this point.

(Said instrument was admitted in evidence as Plaintiff's Exhibit "J", and the same is shown herein at Volume II.)

Mr. Culton: If the Court please, in some way in working [fol. 96] up the stipulation we overlooked the map which represents the Phillips' gathering system in the Panhandle Field leading to the Sneed plant. I referred to that this morning, but in some way we failed to get it in the

stipulation. We would like to have it now marked Exhibit "J-1", if we may, Plaintiff's Exhibit "J-1", and by agreement of counsel, we would like to add the following sentence at the end of the first full paragraph on Page 11 of the Stipulation. We have already gone over it, but in order to get it connected in the right place, at the end of the first full paragraph, I would like to add the following sentence: "A map of Phillips' said gathering system is attached hereto as Exhibit 'J-1' ", and in the original which is timely filed with the Court we will see that that sentence is added.

(Said instrument was admitted in evidence as Plaintiff's Exhibit No. J-1, and the same is shown herein at Vol. II.)

Mr. Looney: (Reading further from Paragraph XVIII)

"Natural gas moving to such site through such Lines A, B, C, D, E and F all flows into the inlet of plaintiff's compressor station. At such station the natural gas is compressed and cooled during the course of its flow through the station. The natural gas then continues its flow to the inlet of Phillips' Hansford gasoline plant, and then through a bank of 4 absorbers where gasoline and certain other liquefiable content are removed in the course of the flow, the hydrocarbon content being reduced by Phillips in conformity with the requirements of the contract between Phillips and plaintiff. From such absorbers the residue [fol. 97] gas flows into the absorber outlet header and then through a bank of scrubbers, and to dehydrators for removal of excess moisture.

"Thereafter, the residue gas continues its flow about 240 feet in a line, 24 inches in diameter, owned and operated by Phillips, to a meter run of 4 sales meters, owned and operated by Phillips and located inside the fence of such Phillips' Hansford gasoline plant (the point of sale and delivery of such residue gas from Phillips to plaintiff and the point of 'taking' by the plaintiff, within the meaning of Section XXIII of H. B. 285, such point being marked 'M' on Exhibit 'I') where such gas enters a line 22 inches in diameter owned and operated by Plaintiff. Such residue gas continues its flow through such 22 inch line to plaintiff's main line extending from Sneed toward its market. Such gas enters such

main line at a point east of plaintiff's compressor station, known as the Hansford Station in Hansford County, Texas.

"In Panhandle's compressor station which is located at the suction (inlet) side of the Phillips' Hansford gasoline plant, Panhandle does nothing to the gas except to increase its pressure. After the gas is compressed, it flows into Phillips' gasoline plant where Phillips extracts liquid hydrocarbons and dehydrates the residue gas before Panhandle 'takes' such gas at the outlet of such gasoline plant. However, the absorbers in the Phillips' gasoline plant are equipped with scrubber sections which remove the entrained oils in the gas stream.

[fol. 98] "C. *The Shamrock McKee Gasoline Plant.*

"Plaintiff purchases from Shamrock Oil and Gas Corporation and from Magnolia Petroleum Company certain quantities of residue gas taken by plaintiff at the outlet of Shamrock's McKee gasoline plant in Moore County, Texas. All of this gas so purchased is residue gas from natural gas produced in Texas.

"Exhibit 'K' accompanying this Stipulation is a schematic layout of such Shamrock-McKee gasoline plant, showing the entry of the natural gas into such plant, the passing of such gas through such plant, and the 'taking' of the residue therefrom by plaintiff at the outlet of such McKee plant."

Mr. Looney: We ask the Reporter to mark the schematic layout of the Shamrock-McKee Gasoline Plant as Plaintiff's Exhibit "K," and we offer it in evidence at this point.

(Said instrument was admitted in evidence as Plaintiff's Exhibit "K", and the same is shown herein at Volume II.)

"The comments now made apply to such operations:

"As indicated on such sketch, the raw gas comes from the wells through part of Shamrock's gathering system (as that term is consistently used in the gas industry and in general usage) into such McKee plant through separate lines (A, B, C and D), which converge into an outlet to the plant (E) and thence flows through the absorbed and treater area (F) [fol. 99] to residue lines (G), from which residue gas is

metered at certain outlets of such plant to Northern Natural Gas Company, Natural Gas Pipeline Company of America, and plaintiff, respectively. Such gas as is 'taken' by plaintiff then flows directly into plaintiff's Sunray compressor station and thence to plaintiff's markets in other states.

"While such residue gas is in Panhandle's Sunray compressor station, immediately after leaving the outlet of the Shamrock gasoline plant, such gas is compressed, cooled, and dehydrated, and it is scrubbed through the use of scrubber sections connected with the dehydrator.

"All of the compression, extraction of liquefiable hydrocarbons, cooling, scrubbing, desulphurization and dehydration which takes place in any of the gasoline plants and compressor stations herein referred to is accomplished while the gas is in the course of continuous flow.

"Exhibit 'L' accompanying this Stipulation shows the connections from the three gasoline plants above mentioned to plaintiff's main line transportation system."

Mr. Looney: Now, we offer in evidence as Exhibit "L" the plat showing these connections from the three gasoline plants into the Plaintiff's main line transportation system.

(Said instrument was admitted in evidence as Plaintiff's Exhibit "L", and the same is shown herein at Volume II.)

"Thus, at Point 1 noted thereon plaintiff takes from Phillips and Skelly the residue gas purchased by plaintiff from Phillips and Skelly at the outlet of the Phillips' Sneed gaso-[fol. 100] line plant into plaintiff's main transportation pipelines, and at the same point retains residue gas from its own production, including the gas purchased by it from other producers along its gathering system.

"Point 2 on such Exhibit 'L' is the point at which plaintiff takes from Shamrock and Magnolia residue gas at the outlet of the Shamrock McKee gasoline plant into plaintiff's Sunray compressor station located at the end of one arm of plaintiff's transportation pipeline system through which arm such gas flows to a point east of plaintiff's Hansford Station and there flows into Panhandle's pipeline extending from that station.

"Point 3 on such Exhibit 'L' is the point at which plaintiff takes residue gas from Phillips Petroleum Company at

the outlet of Phillips' Hansford gasoline plant into plaintiff's transportation line, through which line such gas flows to Panhandle's Hansford Compressor Station. After flowing through such station, such gas moves in a common stream with that portion of the gas delivered into such station from the Sneed station on to plaintiff's markets."

Mr. Looney: Now, Plaintiff offers in evidence now Paragraph XIX from the Stipulation:

"The movement of all of the residue gas which Panhandle takes or retains at the outlet of any of the gasoline plants herein referred to from the wells where produced to the point of 'taking' by plaintiff at the outlet of such respective gasoline plants, and thence through plaintiff's gas pipe-[fol. 101] line system in Texas and other states is a steady and continuous flow of such gas in the manner detailed above from the wells to the points of sale by plaintiff in other states. The taking of such gas and the retaining of such gas at the outlet of such gasoline plants is accomplished by plaintiff through facilities owned by plaintiff that are used exclusively in connection with such taking, receiving and transportation."

Mr. Looney: Plaintiff offers in evidence next Paragraph XX from the Stipulation:

"The gross volumes of residue gas (in MCF) so 'retained' and so 'taken' (within the meaning of such Section XXIII) by plaintiff from gas produced in Texas since such H. B. 285 became effective, prior to the execution of this Stipulation, were as follows:

"During the month of September, 1951	11,482,155
During the month of October, 1951	12,024,321
During the month of November, 1951	11,651,338
During the month of December, 1951	12,151,215
During the month of January, 1952	12,975,181
During the month of February, 1952	11,982,273
During the month of March, 1952	12,966,654"

Mr. Looney: Plaintiff next offers in evidence Paragraph XXI from the Stipulation:

"If such Section XXIII of H. B. 285, on its face or as interpreted by defendants, or as in any other manner inter-

puted, can lawfully be applied to plaintiff's operations in [fol. 102] so taking and so retaining such gas as above set forth, then plaintiff is required by such Section XXIII to pay a tax of 9/20 of 1 cent per thousand cubic feet for the gas so taken and so retained (except such gas as is excluded under the provisions of such section) as an occupation tax for the privilege of so taking and so retaining such gas.

"Of the gas so taken and the gas so retained by plaintiff, as aforesaid, plaintiff in determining the quantity of gas for purposes of calculating the tax has excluded gas used for fuel in connection with lease or field operations and gas sold for carbon black manufacture. The quantities of gas so excluded under the express provision of the Act follow:

September, 1951	813,189 MCF
October, 1951	873,335 MCF
November, 1951	945,490 MCF
December, 1951	947,901 MCF
January, 1952	879,835 MCF
February, 1952	820,828 MCF
March, 1952	960,531 MCF

"The net volume of taxable gas and the taxes payable for each such period, after making the aforesaid exclusions follow:

Month	MCF	Tax payable
September, 1951	10,668,966	\$48,010.35
October, 1951	11,150,986	50,179.44
November, 1951	10,705,848	48,176.32

[fol. 103]

Month	MCF	Tax payable
December, 1951	11,203,314	\$50,414.91
January, 1952	12,095,346	54,429.06
February, 1952	11,161,445	50,226.50
March, 1952	12,006,123	54,027.55

Mr. Looney: Now, then, we go over, Your Honor, the next several ones there we don't offer. I suppose they will be offered by the defendants. Go to Page 29. We next

offer in evidence from the Stipulation Paragraph XXV, commencing on Page 29:

"Plaintiff pays to the State of Texas the general ad valorem tax imposed by the state on all its physical properties located within the state and its franchise tax. The producers of all natural gas produced in Texas, the residue from which is taken by plaintiff at the outlets of the gasoline plants herein referred to, pay the production tax on the natural gas so produced by them and such producers pay ad valorem taxes on all leases from which such gas is produced."

Mr. Looney: Plaintiff next offers in evidence Paragraph XXVII from the Stipulation:

"In accordance with the provisions of V.A.C.S. 7057b (Acts 43rd Legislature of Texas, Chapter 214, as amended) plaintiff, for each of the periods aforesaid and within the time permitted by law, at the time of filing its such reports and paying to the Comptroller of Public Accounts the taxes, filed with said Comptroller its formal written protest in [fol. 104]

Month	MCF	Tax payable
December, 1951	11,203,314	\$50,414.91
January, 1952	12,095,346	54,429.06
February, 1952	11,161,445	50,226.50
March, 1952	12,006,123	54,027.55"

Mr. Looney: Now then, we go over, Your Honor, the next several ones there we don't offer. I suppose they will be offered by the Defendants. Go to Page 29. We next offer in evidence from the Stipulation Paragraph XXV:

"Plaintiff pays to the State of Texas the general ad valorem tax imposed by the state on all its physical properties located within the state and its franchise tax. The producers of all natural gas produced in Texas, the residue from which is taken by plaintiff at the outlets of the gasoline plants herein referred to, pay the production tax on the natural gas so produced by them and such producers pay ad valorem taxes on all leases from which such gas is produced."

Mr. Looney: Plaintiff next offers in evidence Paragraph XXVI from the Stipulation:

"For each of the aforesaid periods set forth in paragraph XXI hereof, within the time permitted by the Act, plaintiff filed with defendant Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, a report on the form prescribed by that public official showing the volumes of gas so taken and so retained by plaintiff during the respective periods, and, at the same time, plaintiff paid to [fol. 105] such official the respective sums shown in the foregoing paragraph XXI. Such reports were filed and such payments were made as follows:

For the month of September, 1951, on October 24, 1951.
 For the month of October, 1951, on November 23, 1951.
 For the month of November, 1951, on December 19, 1951.
 For the month of December, 1951, on January 25, 1952.
 For the month of January, 1952, on February 25, 1952.
 For the month of February, 1952, on March 25, 1952.
 For the month of March, 1952, on April 24, 1952.

Mr. Looney: Plaintiff next offers in evidence Paragraph XXVII of the Stipulation:

"In accordance with the provisions of V.A.C.S. 7057b (Acts 43rd Legislature of Texas, Chapter 214, as amended) plaintiff, for each of the periods aforesaid and within the time permitted by law, at the time of filing its such reports and paying to the Comptroller of Public Accounts the taxes, filed with said Comptroller its formal written protest in which plaintiff set out fully and in detail the grounds and reasons why plaintiff contends that such tax and the demands for payment thereof under the interpretation of such Section XXIII by defendants, or under any other interpretation thereof, are unlawful and unauthorized."

Mr. Looney: Plaintiff next offers in evidence Paragraph XXVIII of the Stipulation:

[fol. 106] "The grounds and reasons set forth in such protest were as follows:

"1. As applied to the residue gas of which Panhandle 'retains' possession at the outlet of the Phillips Sneed

gasoline plant, as set forth in paragraph XVIII of this Stipulation, the so-called 'gathering' tax imposed under H. B. 285 is an attempt by the State to levy a tax on the privilege of retaining and continuing the transportation of gas which is *in* interstate commerce and on the activity or occupation of engaging in interstate commerce. Such tax is, therefore, violative of subdivision 3 of Section 8 of Article I (the commerce clause) of the Constitution of the United States.

"2. As applied to the residue gas of which Panhandle 'takes' possession at the outlet of the Phillips gasoline plant at Sneed, at the outlet of the Shamrock McKee Plant and at the outlet of the Hansford gasoline plant, as set forth in paragraph XVIII of this Stipulation, such so-called 'gathering' tax imposed under H. B. 285 is an attempt by the State to levy a tax on the purchase of gas for immediate transportation in interstate commerce, on the entry of gas into interstate commerce and on the privilege of purchasing gas in interstate commerce and on the activity or occupation of engaging in interstate commerce. Such tax, therefore, is violative of subdivision 3 of Section 8 of Article I (the commerce clause) of the Constitution of the United States.

[fol. 107] "3. The so-called 'gathering' tax imposed by Section XXIII of H. B. 285 is violative of subdivision 3 of Section 8 of Article I (the commerce clause) of the Constitution of the United States as applied to Panhandle's operations, in that it is levied upon a movement of goods in interstate commerce during the course of such commerce.

"4. While denominated a 'gathering' tax, the tax provided for in Section XXIII of H. B. 285 is not, in fact, a tax upon the exercise of the function of gathering gas as that term is consistently used in the industry, but is upon the act of taking gas into commerce and the privilege of retaining gas already in commerce. Since the gas of which Panhandle 'takes' possession and the gas of which Panhandle 'retains' possession is so 'taken' and 'retained' in and as a part of interstate commerce, such tax is, as to such gas, violative of subdivision 3 of Section 8 of Article I (the commerce clause) of the Constitution of the United States.

"5. As applied to the residue gas so taken and purchased by Panhandle from Phillips and Shamrock, such tax is not imposed on the one who really gathers gas, either natural or residue, as that term is consistently used in the industry. This company has no part in the gathering of such gas and owns no part of the facilities by which gas is, in fact, gathered prior to the sale of the residue to this company, and the imposition of such tax on Panhandle is violative of the due process clause of the Fourteenth Amendment [fol.108] to the Constitution of the United States and of the due process section (Article I, Section 19) of the Constitution of the State of Texas.

Mr. Culton: Your Honor, with respect to No. 6, at the time these protests were prepared originally, we did not know what interpretation would be given the statute. That subdivision is not pertinent under the interpretation which is given the statute by Counsel for both parties in this case. It was written, as I say, before it was known what interpretation might be given to the Act.

Mr. Looney: In addition, according to the interpretation given it by the State Comptroller, who was the officer charged with the duty of administering the Act.

Mr. Culton: Yes, that is right.

Mr. Looney: Is that correct, Mr. Attorney General? Did we state that correctly?

Mr. Mathews: Yes.

Mr. Looney: All right. We will read "7".

"7. Such section XXIII of H. B. 285 is vague, indefinite, unintelligible and incapable of uniform application.

Mr. Culton: That also passes out of the case, as long as the present interpretation by Counsel for both parties remains, unless some other interpretation be given by somebody else later.

Mr. Looney: In addition to that, that ground, wasn't actually levelled at the first sentence of the definition?

Mr. Culton: The first sentence.

[fol.109] General Daniel: Which is not involved in this case.

Mr. Culton: Which is not involved in this case at all. I think we are all in agreement as to what is meant by the second sentence of the definition.

Mr. Looney: "8".

General Daniel: Are you still introducing these?

Mr. Geppert: Are you still introducing "6" and "7"?

Mr. Mathews: All the Stipulation says is that the grounds of protest were, and they speak for themselves.

Mr. Looney: That is right.

Mr. Culton: I am making that explanation for the Court's information as we go through. We will not have in the brief any point addressed to either "6" or "7".

General Daniel: I wondered if you wanted them in the record.

Mr. Culton: No, I think they are necessarily a part of the record as our grounds of protest. I see no occasion for anybody to give any interpretation that would make it necessary to discuss No. 6. I don't know what somebody filing suggestions might interpret the Act to mean, and therefore I would not be willing to discard Section 7, but under the interpretation which both sides now are giving it, I think Section 7 will not be of importance.

Mr. Looney: Sections 6 and 7.

Mr. Culton: That is right, "6" or "7".

"6. The provision in subdivision (4) of Section XXIII [fol. 110] of H. B. 285 by which it was made unlawful for Panhandle to require under its contracts that Phillips and Shamrock pay the tax imposed under such Act by reason of the 'taking' of gas by Panhandle from such sellers is unreasonable, arbitrary and violative of the due process clause of the Fourteenth Amendment of the Constitution of the United States and the due process section (Article I, Section 19) of the Constitution of the State of Texas, and is violative of Article I, Section 10, of the Federal Constitution and Article I, Section 16, of the Texas Constitution, both of which prohibit the enactment of laws that impair the obligations of contracts.

"7. Such Section XXIII of H. B. 285 is vague, indefinite, unintelligible and incapable of uniform application. It is, therefore, violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States and of the due process section (Article I, Section 19) of the Constitution of the State of Texas.

"8. Since such Section XXIII of H. B. 285 is invalid as

applied to gas retained and gas taken in interstate commerce, such tax imposed under such section is by the very wording of such Section XXIII invalid and inapplicable to the gas delivered by Panhandle to Southwestern Public Service Company for distribution in Gruver, Texas, the gas delivered to three taps for gas used in irrigation, to the New Hope School in Hansford County, Texas, and the form taps—all of which are set forth in this Stipulation; [fol. 111] and for the same reason such tax is invalid as to the natural gas delivered by Panhandle to E. B. Dulaney and Skelly School as set forth in this Stipulation."

Mr. Looney: Plaintiff next offers in evidence Paragraph XXIX from the Stipulation:

"Defendant Robert S. Calvert, as Comptroller, in accordance with such V.A.C.S. 7057b, has transmitted to defendant Jesse James, State Treasurer, the sums of money received from plaintiff as set forth in numbered paragraphs XXI and XXVI hereof, and informed such Treasurer in writing that such money was paid under protest; and such Treasurer has in all things complied, as to such payments, with the provisions of V.A.C.S. 7057b applicable thereto."

Mr. Looney: Plaintiff next offers in evidence Paragraph XXX from the Stipulation:

"Ninety days did not elapse between the date of any such payment of taxes and the filing of such protest before the filing of suit by this plaintiff for the recovery thereof."

Mr. Looney: The Plaintiff rests, Your Honor.

Mr. Mathews: Your Honor, we now offer in evidence Paragraph XXII of the Stipulation.

Mr. Looney: Your Honor, we realize this is before the Court, and I know that the presumption is that the Court will not consider anything except material and relevant evidence, but we do wish to object to the introduction in evidence of Paragraph XXII that has just been offered by [fol. 112] the Defendants on the ground that the part stipulated to is immaterial and irrelevant. We do not care to argue at all about it. We just want the record to manifest our objection on it.

The Court: The objection is overruled.

Mr. Looney: Note our exception.

XXII

"Panhandle Eastern Pipeline Company has heretofore filed with the Federal Power Commission a revised schedule providing for increases in a portion of its rates, namely, those for sale for resale. In accordance with the provisions of the Natural Gas Act, the Federal Power Commission suspended such schedules (or tariffs) and directed that a hearing be had thereon. Such hearing has been in progress for several months and is now in recess. Under the provisions of the Natural Gas Act, Panhandle has put such increased rates into effect under bond pending final determination of such proceedings before the Commission, and in presenting its evidence at such hearing it has shown that payments to the Comptroller of the gathering tax under H. B. 285 are being paid currently under protest and that unless Panhandle's attack on the validity of such H. B. 285 is sustained, the amount so paid will constitute a part of Panhandle's operating expenses."

Mr. Mathews: We next offer in evidence Paragraph XXIII.

Mr. Looney: We would like, Your Honor, the same objection [fol. 113] that is not material and relevant. Under that lengthy document, you might reserve your ruling until he finishes reading it.

The Court: That is all right.

Mr. Mathews: "XXIII

"1. In the West Panhandle and Texas Hugoton gas fields there is some acreage which is not contracted for a long period of time, and there is some acreage which is not contracted or dedicated to anybody. If the producers in such respective fields shall hereafter, in the aggregate, produce greater quantities of gas than are being produced at the present time, the net result will be the depletion of the field at an earlier date than now appears likely if the production shall, in the aggregate, remain as it now is. If this happens, no purchaser of gas will be able to fill its market demand over as long a period of time as it could if the production should remain what it now is. There is now more room in such fields for more production than is currently being taken from the wells. Under the Texas Oil and Gas Conservation Statutes, it is provided in Section 15 of

V.A.C.S., Article 6008, that 'in all common reservoirs producing both sweet and sour gas no gas well shall be permitted to produce in excess of 25 per cent of its daily productive capacity.' Since both the West Panhandle Field and the Texas Hugoton Field constitute common reservoirs producing sweet and sour gas, that statutory limitation is applicable to the wells in those fields. Such Section 15 of [fol. 114] Article 6008 also provides that the Commission upon a finding that reservoir conditions require that such percentage be increased to prevent waste, and that such increase will not create a drainage condition as between sweet and sour gas lands, the Commission may authorize an increase in such allowable production. Such section also provides that when the allowable production allocated to any well is more than 15 per cent of its daily producing capacity and the Commission finds that the production of its daily allowable will cause waste due to the intermingling of sweet and sour gas, the Commission may order the production from such well restricted to 15 per cent of its daily producing capacity.

"2. Many of the wells in the West Panhandle and Texas Hugoton Fields could now produce at a greater rate under the oil and gas conservation laws if there were a greater market demand; but some wells in such fields could not produce at rates greater than they are now permitted to produce, whatever the demand, because of the 25 per cent statutory limitation above referred to. The laws and regulations in Texas are designed to give the opportunity of producing ratably from the reservoirs, but it is up to the producers in each case to take advantage of the opportunity. The length of time a supply of gas will be available to a producer cannot be determined by dividing the estimated volumes of gas in place under his leases by the current daily market requirements. The volumes of gas a producer [fol. 115] can produce in the future depend not only on the amount of the production of such producers and his own nominations but also upon the nominations of others who need gas and of the allocations to producers from whom they purchase. Under the Texas proration laws and regulations of the Commission, there are conditions in procedure of proration and the allocation of demand which make it possible at the election of the supplier of the market to

avail himself of means for getting the gas he requires, but he then must make moves on his own part, else he does not get the gas currently. Thus, Section 18 of Article 6008, Vernon's Statutes, provides that when unforeseen contingencies increase the demand for gas required by any distributor, transporter or purchaser, to an amount in excess of the total allowable production of the wells to which he is connected, he is authorized to increase his take ratably from all such wells in order to supply his demand for gas, provided that notice of such increase be given to the Commission within five days and further that the Commission at its next hearing shall adjust the inequality of withdrawals caused by such increase in fixing the allowable production of the various wells in the common reservoir. Section 20 of such Article 6008 provides that if any owner of any gas well has failed or refused to utilize or sell the allowable production from his well, when such owner has been offered a connection or market for such gas at a reasonable price, such well shall be excluded from consideration in allocating the daily allowable production from the [fol. 116] reservoir until the owner thereof signifies to the Commission his desire to utilize or sell such gas; and that in all other cases all gas wells shall be taken into account in allocating the allowable production among wells producing the same type of gas. If a particular purchaser nominates an additional quantity of gas per day, the increased nominations would be allocated to all of the wells in the field which is a proration unit, and as many of those wells belong to producers other than a producer supplying such purchaser, such other wells would be allocated their proportionate part of any such added requirements. The producer would have to own the proration unit 100 per cent before he could produce the entire amount of gas to fill such increased market demand from his own wells over any period of time. In the event, because of such unforeseen contingencies, a purchaser should increase his demand to an amount in excess of the total allowable production of the wells to which he is connected, then under the conservation statutes and rules and regulations of the Railroad Commission, such purchaser supplying such market could supply such increase, subject to adjustment, by the Commission at the next hearing; but if there was a con-

tinuing market demand for such increase, such market increase would go into the total market and all would be allocated to all of the producers in the field in accordance with the provisions of the Commission's regulations.

"But for the Texas oil and gas conservation statutes and the enforcement by the Railroad Commission of Texas, pro-[fol. 117] ducers in the field could drill as many wells as they desired and could open their wells at the rate of 100 per cent open flow and could burn both the sweet and sour gas for the production of carbon black, or they could extract the gasoline and other liquid hydrocarbons in a gasoline plant and flare the residue gas. If this happened, the gas in the reservoir would become depleted in the course of a few years. If only a portion of the producers in the field drilled additional wells and operated such wells at 100% open flow, such producers would in the course of a few years drain the gas from under the acreage of the producers who were not also producing at 100% open flow from a proportionate number of wells. After such fields should be depleted, neither Panhandle Eastern nor any other purchaser of gas could supply its market demand with gas from such fields and the same would be true with respect to any other field in the state which might be subjected to the same rapid depletion in the absence of the Texas oil and gas conservation statutes and the enforcement thereof.

"3. At the time negotiations were had between Phillips and Panhandle Eastern, estimates were made by the respective parties as to the gas content in the reserves dedicated to the purchasers by such contracts and of the period of time such reserves would continue to last under then existing production conditions in the respective fields in which such reserves were located. And after exercising its own judgment as to whether or not total production would [fol. 118] probably increase or decrease in the future, plaintiff reached the business judgment that the reserves would be available to it long enough to justify economically the construction and operation of the additional facilities required to handle such gas being purchased. It was then estimated that gas would be available from such reserves for approximately 20 years, but the purchaser took its chance as to whether or not the fields would be depleted

prior to such anticipated date or would last longer than estimated.

“At the time such contracts were entered into, neither the sweet gas portion of the Panhandle field nor the Texas portion of the Hugoton Field had been subjected to proration by orders of the Railroad Commission of Texas, except as its orders implemented the statutory 25 per cent limitation on production. Prior to the issuance by the Railroad Commission of Special Order No. 10-13,196, dated September 24, 1948, adopting operating field rules for the West Panhandle Gas Field, consisting of Carson, Gray, Hartley, Hutchinson, Moore and Potter Counties, Texas, effective October 1, 1948, as amended by orders effective January 10, 1949, and September 1, 1949, there was no order of the Railroad Commission of Texas prorating sweet gas in the West Panhandle Gas Field.

“The proration of sour gas in the West Panhandle Field prior to October 1, 1948, was under the basic order dated May 4, 1938, fixing the daily allowable production and method of allocation of sour dry natural gas in the field. [fol. 119] This basic order was the result of the passage of Senate Bill 407 at the regular session of the 45th Legislature, and of House Bill 266 at the regular session of the 44th Legislature, and public hearings held by the Commission on or before the 20th day of each calendar month, including hearings held in Austin, Texas, on November 19 through 21, 1935; April 13, 1937; June 18, 1937; and February 18, 1937, and the hearings held in Amarillo, Texas, on July 24, 1937; August 27, 1937, September 30, 1937; February 22, 1938; and March 25, 1938, with respect to the existence and imminence of waste of natural gas in the State of Texas and the existence of undue drainage between properties in gas fields in the State of Texas.

“By Special Order No. 10-13,196, dated September 24, 1948, it was ordered by the Commission that the two areas of the Panhandle Field which had by common usage come to be identified as the ‘West Panhandle Sweet Gas Field’ and the ‘West Panhandle Sour Gas Field’ be consolidated for operational and developmental purposes as ‘West Panhandle Gas Field.’ In consolidating the two areas the Commission found that the gas wells producing in the sweet and the sour gas areas were producing from a common

reservoir; that there was undue preventable and cognizable drainage of gas between tracts of diverse ownership and such undue preventable and cognizable drainage was the result of disproportionate, non-uniform and unratable withdrawals of gas as between properties and wells in the field. The Commission found further that in order to prevent [fol. 120] undue and cognizable drainage of gas across property lines then taking place and to obviate the confiscation of property resulting from such undue and cognizable drainage, it was necessary to adopt a gas allocation formula to apply uniformly to the 'West Panhandle Gas Field' as a whole and without regard to the sulphur content of the gas. The Commission then by the adoption of Rule 2 in Special Order No. 10-13,196 adopted the $\frac{1}{3}$ - $\frac{2}{3}$ gas allocation formula which has been found theretofore under the basic order of May 4, 1938, as applied to the proration of sour gas production to be best suited to prevent cognizable and preventable drainage, tend to reduce drainage and the creation or accentuation of low pressure areas, and reduce drainage across property lines.

"Proration orders affecting the sweet gas portion of the Panhandle Field and the Texas portion of the Hugoton Field entered in 1948 were not designed to preserve the supply of any purchaser of gas for any particular time, but were only designed to prevent waste and adjust correlative rights of all producers in each of such fields for the aggregate markets supplied therefrom. Neither Panhandle Eastern Pipe Line Company nor any other purchaser had any guaranty under the terms and provisions of the Texas conservation laws, either before or after the issuance of regulations by the Texas Railroad Commission, that a particular supply of gas would be available to them for any particular period of time. A copy of the orders of the Railroad Commission referred to in this paragraph is attached hereto as Exhibit 'M.' "

[fol. 121] The Court: The objection to XXIII is overruled.

Mr. Mathews: We now offer in evidence at this time as Defendant's Exhibit I a copy of these Orders of the Railroad Commission, the exhibits referred to in the Stipulation as Exhibit "M".

(Said Orders were admitted in evidence as Defendants' Exhibit No. I, and the same are shown herein at Volume II.)

Mr. Mathews: We now offer in evidence Paragraph XXIV of the Stipulation.

Mr. Looney: We want to also object to Paragraph XXIV of the Stipulation, because we urge that it is irrelevant and immaterial. We do not care to argue it at this time.

The Court: All right.

Mr. Mathews: (Reading Paragraph XXIV as follows:)

"1. The Railroad Commission of Texas, under its rule-making power as provided for in Section 9 of Article 6008, Vernon's Civil Statutes of Texas, promulgated rules 8 and 21, which read as follows:

" 'Rule 8. Gas to be Metered.

" '(a) All natural gas produced from gas wells in this state shall be accounted for by measurement and reported to the Commissioner by the producer or purchaser of gas.

" '(b) All natural gas produced from oil wells in this State and sold, processed for its gasoline content, used in a field other than that in which it is produced, or used in recycling or repressuring operations shall be accounted [fol. 122] for by measurement and reported to the Commission.

" '(c) All natural gas produced from oil wells in this State which is not covered by the provisions of Rule 8-B above, but which is used as fuel shall be accounted for by measurement or accurate estimate based on its use and reported to the Commission.

" '(d) Natural gas delivered at the well and required to be reported under this rule shall be reported to the Commission by the gasoline plant, gas pipeline company, or other person taking the gas.

" 'Natural gas produced from the well and required to be reported under this rule which is not delivered to and reported by a gasoline plant, gas pipeline or other person shall be reported to the Commission by the producer or well owner.

" 'The record of all measurements or estimates required

by this rule shall be maintained in a permanent file and made available to the Commission representatives at all times.'

“ ‘Rule 21. Separating Devices and Tanks.

“ ‘Where oil and gas are found in the same stratum and it is impossible to separate the one from the other, or when a well has been classified as a gas well according to Commission Order No. 20-550, dated January 18, 1939, and titled ‘General Order Classifying Wells Producing Condensate in the State of Texas’, or where a well has been classified as a gas well under the Statute and such gas well is not connected to a recycling plant and such well is being [fol. 123] produced on a lease and the gas utilized under Article 6008, the operator shall install a separating device of approved type and sufficient capacity to separate the oil or liquid hydrocarbons from the gas, which separating device shall be kept in place as long as a necessity therefor exists, and after being installed such device shall not be removed nor the use thereof discontinued without the consent of the Railroad Commission of Texas. All oil and/or distillate or any other liquid hydrocarbons as and when produced shall be adequately measured according to the pipe line rules and regulations of the Commission before the same leaves the lease from which they are produced and sufficient tankage and separator capacity shall be provided by the producer to adequately take daily gauges of all oil, distillate and/or liquid hydrocarbons and gas produced.’

“2. In a plant that removes or extracts gasoline or liquid hydrocarbons from gas by the scrubbing or absorption processes, the gas is often run through a compressor which collects and compresses the gas. The gas then passes through a cooler to remove the heat of compression, and then passes into the lower part of an absorbing tower from where the gas passes upward counter-current to the descending absorbent through packing or baffling.

“3. The State of Texas, through the Railroad Commission of Texas, exercises under the Texas State Oil and Gas Conservation Statutes certain jurisdiction over plants that remove or extract gasoline or other liquid hydro-

[fol. 124] carbons by the scrubbing or absorption processes.

"4. The Railroad Commission of Texas, by an order dated December 19, 1938, as amended on January 25, 1939, requires that all natural gas entering and leaving plants that remove or extract gasoline or other liquid hydrocarbons from gas, whether by the scrubbing, absorption, compression or other process, as well as all liquids recovered at such plant, must be metered or otherwise measured in accordance with the Railroad Commission's rules and regulations, and the operators of such plants are required to obtain a certificate of compliance from the Commission.

"5. Neither the Congress of the United States, the Federal Power Commission, or any other Federal agency has by any law, rule or regulation, exercised any control over the installation and operation of the plants that remove and extract the gasoline and liquid hydrocarbons from the gas that is taken by plaintiff at the outlet of any gasoline plant.

"5a. Neither the Congress of the United States, the Federal Power Commission, or any other Federal agency has by any law, rule or regulation exercised any control over the installation and operation of the plants that remove and extract the gasoline and liquid hydrocarbons from the gas that is taken and retained by plaintiff at the outlet of either Phillips Gasoline Plants, or the Shamrock McKee Gasoline Plant.

[fol. 125] "6. The only plants commercially used in Texas to extract the liquid hydrocarbons therefrom are those specifically mentioned in paragraph (c) of Section XXIII of H. B. 285.

"7. The State of Texas, through the Railroad Commission of Texas, under and by virtue of the Texas State Oil and Gas Conservation Statutes, exercises certain controls over the drilling, completing, and producing of oil and gas from the earth and waters of this State.

"8. Neither the Congress of the United States, the Federal Power Commission, or any other Federal agency, has by any law, rule, or regulation, exercised any control over the drilling, completing or producing of oil and gas from the earth and waters of this State.

"9. Where gas contains an appreciable amount of liquid hydrocarbons therein, it is sometimes found economically expedient to separate the liquid hydrocarbons therefrom in order that the gas may be transmitted through a pipeline any considerable distance most economically.

"10. The gas contracts between plaintiff and those from whom plaintiff purchases residue gas contain standards of quality as set out in such contracts which are attached hereto as Exhibits 'B,' 'D,' 'E,' 'F' and 'G'.

"11. Sour gas in its natural state can be used in the manufacture of carbon black and can be used in gas lift operations of oil and gas wells, but frequently the content of sulphur and sulphur compounds is such that the gas [fol. 126] is not desirable for use in domestic fuel operations because of the toxic and corrosive nature of hydrogen sulphide gas. However, frequently such sour gas, when commingled with sweet gas, may be satisfactory for such purposes.

"12. Such sour gas in order to make it most desirable for use as light or fuel for industrial or domestic purposes is subjected to a desulphurization process.

"13. Neither the Congress of the United States, the Federal Power Commission, or any other Federal agency has, by any law, rule, or regulation, exercised any control over the removal of either hydrogen sulphide or sulphur from gas produced from the waters or earth of the State of Texas.

"14. That attached hereto and marked Exhibit 'M' is a true, complete and full copy of certain rules and regulations promulgated by the Railroad Commission of Texas as authorized by Article 6008, Vernon's Civil Statutes of Texas, relative to the enforcement of the Texas Oil and Gas Conservation Statutes. Under the laws of the State of Texas, such rules and regulations, when valid, have the same force and effect as the statutes themselves."

The Court: For the purpose of the record, the objection is overruled.

[fols. 127-129] IN THE DISTRICT COURT OF TRAVIS COUNTY,
TEXAS, 126TH JUDICIAL DISTRICT

No. 91,338

MICHIGAN-WISCONSIN PIPE LINE COMPANY

VS.

ROBERT S. CALVERT, et al

Statement of Facts

Before Honorable Jack Roberts, Judge

APPEARANCES

Honorable Everett L. Looney, Honorable Edward Clark,
both of Austin, Texas

Honorable D. H. Culton, of Amarillo, Texas, Honorable
S. A. L. Morgan, of Houston, Texas, attorneys for Plain-
tiff

Honorable Price Daniel, Attorney General of Texas

Honorable Charles D. Mathews, Assistant Attorney Gen-
eral

Honorable C. K. Richards, Assistant Attorney General

Honorable W. V. Geppert, Assistant Attorney General
Attorneys for Defendants

Be It Remembered that upon the trial of the above en-
titled and numbered Cause, before His Honor, Jack Rob-
erts, Judge of said Court, on the 13th day of May, A. D.,
1952, being one of the days of the Regular March 1952
Term of said Court, and succeeding days until completion
of the trial of said Cause, the following proceedings were
had:

[fol. 130] Afternoon Session, May 13, 1952

Mr. Looney: Your Honor, in this case, 91,338, Michigan-
Wisconsin Pipe Line Company versus Robert S. Calvert, et
al, pending in this Court, there has just been filed at 2:20
P. M. today, May 13, a Stipulation signed by the attorneys

for Plaintiff and the attorneys for the Defendants, the first paragraph of which reads:

"For the purpose of facilitating the trial of this cause only and preventing unnecessary costs in adducing the evidence herein, the parties hereto through their attorneys of record hereby stipulate that qualified witnesses who could and would be present on the trial hereof would summarize the documentary evidence hereinafter referred to and orally testify that:"

Mr. Looney: And then on the last page the Stipulation continues:

"The above evidence may be considered by the Court for all purposes, subject to proper objections as to materiality and relevancy, as if actually adduced under oath from the witness stand on the trial hereof."

Mr. Looney: Your Honor, except as pointed out by Mr. Culton in his statement, the Stipulations in this case follow **very much the pattern** set by the stipulations in the Panhandle Eastern case. Of course, there is a difference in that Michigan-Wisconsin Pipe Line Company doesn't pro-[fol. 131] duce any gas in Texas and doesn't sell any gas in Texas, and all of the gas it gets in Texas is residue gas from the Phillips' Plant, as shown on that schematic layout. We read all of the Stipulations as we offered them in evidence yesterday in connection with the Panhandle Eastern case. Insofar as Plaintiff is concerned, we would as soon either read it as we introduce it, or just introduce it by reference, whichever might be satisfactory with the Court. It would save some time, but you are going to have them to read and to study them anyhow.

The Court: There is no necessity to read them. Just point out anything you want to point out.

Mr. Looney: All right, sir. Then, Plaintiff offers in evidence from the Stipulation Paragraph I, Paragraph II, Paragraph III, Paragraph IV, Paragraph V, Paragraph VI, Paragraph VII.

"Paragraph I

"Plaintiff is a corporation, incorporated under the laws of the State of Delaware. Defendant Robert S. Calvert is

Comptroller of Public Accounts of the State of Texas; defendant Price Daniel is Attorney General of the State of Texas. All of such defendants are sued in their official capacities in accordance with the provisions of V. A. C. S. 7057b, being the Acts of the 43rd Legislature of Texas, Chapter 214, as amended."

"Paragraph II

"This suit is brought under said V. A. C. S. 7057b (being [fol. 132] the Acts of the 43rd Legislature of Texas, Chapter 214, as amended) seeking a determination that Section XXIII of H. B. 285, Chapter 402, page 740, Acts of the 52nd Legislature of the State of Texas, effective September 1, 1951, is invalid on its face and as interpreted by defendants, insofar as it applies to plaintiff's operations, and seeking the recovery of moneys heretofore paid under protest by plaintiff and moneys that will be so paid during the pendency of this suit under the requirements of defendant Robert S. Calvert, plus interest thereon as provided in said V. A. C. S. 7057b."

"Paragraph III

"Plaintiff is a natural gas company within the definition of that term contained in the Natural Gas Act of 1938, as amended, and holds certificates of convenience and necessity under which it is authorized to transport in interstate commerce and to sell in interstate commerce gas received into its line for such transportation and sale."

"Paragraph IV

" 'Natural gas' as that term is used herein, refers to gas as produced from the wells referred to. 'Residue gas', as used herein, refers to the gas remaining from such natural gas after certain liquefiable hydrocarbons have been removed therefrom and after desulphurization, if any.

"Natural gas in going through a gasoline plant or other process to separate oil, gasoline or other liquid hydrocarbons or to extract hydrogen sulphide or carbon dioxide [fol. 133] or any other element undergoes certain changes, both in quality and quantity. Among the changes are these: The residue gas leaving the extraction or separating device

is usually at a lower pressure, the temperature is sometimes higher, and the specific gravity of the gas is less than that of the natural gas which enters such plant. There are differences between the proportion of the methane content, the ethane content and the content of other hydrocarbons. Likewise, when the hydrogen sulphide or carbon dioxide are extracted, there is a percentage variance in the constituents remaining in the gas. In addition to these changes in constituents, the volume of the residue gas is less than the volume of the natural gas which enters the extraction plant due to the removal of some of the constituents of the natural gas.

“V

“Plaintiff sells no gas in Texas. It owns and operates a gas pipeline system, consisting principally of a 24 inch pipeline with 16 compressor stations (one of which is leased), utilizing 156,980 h.p., and other necessary facilities. The system originates at a point in Hansford County, Texas, about one-fourth of one mile south of the boundary between Texas and Oklahoma and extends therefrom in a general northeasterly direction to a point near Sandwich, Illinois, where it branches into two 22-inch lines, one going to its terminus at the Austin Gas Storage Field near Big Rapids, Michigan, and the other (with successive reductions in [fol. 134] diameter) to Green Bay, and other communities served in Wisconsin. The delivery capacity of the pipeline is approximately 303 million cubic feet of gas daily, depending upon temperature conditions as between the winter and summer months. The customers of plaintiff include 16 gas distribution companies serving markets in Missouri, Iowa, Wisconsin and Michigan. The principal cities served are Detroit, Ann Arbor, Grand Rapids, and Muskegon, Michigan, and Milwaukee, Madison, Sheboygan, Racine, and Green Bay, Wisconsin. The total population of the consuming markets for which this company supplies gas is estimated at 5,000,000 persons.

“VI

“Plaintiff produces no gas in Texas or elsewhere. It gathers no gas (within the meaning of that term as it is consistently used in the gas industry and in ordinary usage)

in Texas or elsewhere. However, it is engaged in 'gathering gas' as that term is defined in Section XXIII of House Bill 285 in that it is the first taker of residue gas for transmission through a pipeline after such gas has passed through the extraction plant of Phillips Petroleum Company. The supply for its markets is residue gas, which gas is purchased by plaintiff from Phillips Petroleum Company at the outlet of the Phillips Sherman Gasoline plant located in Hansford County, Texas, near the boundary line between Texas and Oklahoma and adjacent to the field compressor station of plaintiff. Upon such purchase such gas goes directly from the outlet of such Phillips Sherman gasoline [fol. 135] plant into plaintiff's facilities in the manner hereinafter detailed for transportation to its markets, all of which are in states other than Texas."

"VII

"The gas so delivered to plaintiff by Phillips is residue from natural gas produced by Phillips from gas reserves dedicated to the plaintiff under a long term contract, or purchased by Phillips from other producers, which gas is produced from gas reserves which are dedicated or contracted to Phillips and in turn dedicated or contracted by Phillips to the plaintiff under a long term contract. Phillips retains the right to remove liquefiable hydrocarbons from such gas so long as the heating value thereof is not reduced below 970 BTU per cubic foot. True copies of such contracts are attached hereto and marked Exhibit 'A'. Such gas reserves are located in either the Texas portion or the Oklahoma portion of the Hugoton Field, approximately 93% of the gas being produced in Texas and approximately 7% of the gas being produced in Oklahoma. After such natural gas is produced, either by Phillips or by other producers, it is gathered (within the meaning of that term as it is consistently used in the gas industry and in ordinary usage) by Phillips through an extensive gathering system covering many wells both in Texas and in Oklahoma. A portion of such gas when produced or purchased and gathered by Phillips contains sulphur or sulphur compounds [fol. 136] pounds which are objectionable and are removed by Phillips through a desulphurization process. All of such

natural gas when produced and gathered contains liquefiable hydrocarbons. Before the gas is delivered to plaintiff by Phillips the natural gas is processed through Phillips' gasoline plant in Hansford County, Texas, where liquefiable hydrocarbons are extracted pursuant to Phillips' rights under such contracts. The residue gas is delivered by Phillips to the facilities of the plaintiff as hereinafter detailed."

Mr. Culton: In connection with VII, Your Honor, we have a book of contracts that we would like to have marked Plaintiff's Exhibit "A". The Counsel expect by agreement to take out those contracts which we think might be pertinent or that either thinks might be pertinent, so as to keep the record from being too big, a number that probably don't go into any of the questions involved here, and I think we can take three or four of these contracts and get all that is desired, but Counsel have an agreement to work out something along that line, and we are just asking that the entire volume be marked as Plaintiff's Exhibit I, and we offer it in evidence.

(Said instrument was admitted in evidence as Plaintiff's Exhibit "A", and the portions thereof above referred to are shown herein at Volume II.)

Mr. Looney: Plaintiff offers in evidence from the Stipulation Paragraph VIII, Paragraph IX, Paragraph X.

[fol. 137]

"VIII

"At all times during the actual gathering by Phillips of the natural gas of which such residue gas is a constituent, and during the time of the extraction of the sulphur and the liquefiable hydrocarbons from such natural gas, the residue gas constituent is already dedicated by contract to sale and delivery to plaintiff for transportation to points in other states in accordance with the terms of the contracts attached hereto (Ex. A) and the aforesaid certificates of convenience and necessity issued to plaintiff."

"IX

"Under the contracts, marked Exhibit 'A', Phillips sells and delivers to plaintiff gas produced from certain wells in the Hugoton Field in Sherman and Hansford Counties in

Texas, and Texas County, Oklahoma. Pressures at the well mouth vary from 250 to 360 pounds per square inch, under which the gas flows without compression through certain lines used by Phillips in gathering such gas (within the meaning of that term as it is consistently used in the gas industry and in ordinary usage) from the wells and delivering same into Phillips' said gasoline plant, which pipelines are commonly referred to as Phillips gathering system, and continues to flow without compression (except for compression of vapors in connection with the extraction of liquefiable hydrocarbons) through such gasoline plant to plaintiff's facilities as hereinafter referred to. Such gas flows from approximately 594 connected wells, of which approximately [fol. 138] 466 produce sweet gas and 128 produce sour gas (as defined by the laws of Texas).

"X

"By means of pipelines of various sizes owned and operated by Phillips, hereinabove referred to as Phillips gathering system, the gas flows from the wells to Phillips' Sherman gasoline plant in Hansford County, Texas. Attached hereto, marked Exhibit 'B', is a map showing the gas reserves dedicated to plaintiff and such gathering system.

"Accompanying this stipulation as Exhibit 'C' is a diagrammatic sketch of the layout of Phillips' said Sherman gasoline plant in Hansford County, Texas, together with the connections of Phillips' said gathering lines into such gasoline plant, the flow of such gas through such plant and the flow of the residue gas from the outlet of such plant into plaintiff's facilities near plaintiff's compressor station above referred to. An explanation of such flow is here set forth:

"(1) Line H, which is 16 inches in diameter, extends from the westerly portion of Texas County, Oklahoma, in a general southeasterly direction to the Sherman plant, a distance of about 22 miles. This line crosses the State boundary at a point about $12\frac{1}{2}$ miles from the Sherman Plant. Line H-2, 10 inches in diameter, crosses the State boundary and connects with Line H at a point about 200 yards east of the point where the latter line crosses the State boundary. From the interconnection of Lines H and

H-2 to the Sherman gasoline plant enclosure, a distance of about $12\frac{1}{2}$ miles, there is no pipeline connection with [fol. 139] Line H, and gas collected from wells in Texas County, Oklahoma, flows through this line.

“(2) Line G, 24 inches in diameter, extends from the easterly portion of Texas County, Oklahoma, to the Sherman gasoline plant. It crosses the State boundary about 14 miles east of the plant, and for the last $12\frac{1}{2}$ miles runs in a Westerly direction. Line B, 10 inches in diameter, bringing gas produced in Texas County, Oklahoma, and Hansford County, Texas, connects with Line G at a point approximately $4\frac{1}{2}$ miles west of the point where Line G crosses the State boundary. Between the latter point and a point 8 miles east of the Sherman plant, lines from some 10 wells in Hansford County connect with Line G. The commingled gas then flows the remaining distance of 8 miles to the Sherman gasoline plant enclosure.

“(3) By means of lines of varying diameter up to 24 inches, owned and operated by Phillips, gas flows from wells in Sherman and Hansford Counties, Texas, including wells in the Stratford acreage, to the site of a proposed booster station in the northeasterly portion of Sherman County. From this point, the gas is carried a distance of 13 miles northeasterly to the Sherman gasoline plant enclosure by three parallelling lines, M, N, and O, each 24 inches in diameter. Line M carries sweet gas, and Line O carries sour gas. Line N carries a mixture of sweet and sour gas. Gas from 14 wells flows into Line N through two lines connecting at a point about 5 miles from the Sherman plant enclosure. The amount of gas thus added to Line N [fol. 140] is slight in relation to the total volume in Line N.

“The gas that flows through Line H and H-2 that is later taken by plaintiff at the outlet of the Sherman Gasoline Plant is not involved in this suit and was and is not considered in calculating the amount of occupation tax due by plaintiff for the reason such gas was not ‘produced in Texas.’ That portion of the gas that flows through the Line G and Line B that was produced in Texas County, Oklahoma, that is later taken by plaintiff at the outlet of the Sherman Gasoline Plant is not involved in this suit and was and is not considered in calculating the amount of

occupation taxes due by plaintiff for the reasons that such gas was not 'produced in Texas.'

"The gas from Lines G, H, M and part of the gas from Line N is commingled in a common header inside the Sherman plant enclosure, and then flows through a bank of three sweet-gas scrubbers to remove dust, pipe rust and other foreign matter. Likewise, gas from Line O and part of the gas from Line N is commingled and flows through a bank of three scrubbers, and is then treated for removal of hydrogen sulphide so that all the gas delivered to plaintiff meets the sales contract specifications.

"Next, all of the foregoing gas flows to a common header where it is commingled, and then flows through a bank of ten absorbers, where the content of heavier hydrocarbons is reduced in conformity with the requirements of the sales contracts.

[fol. 141] "Thereafter, the residue gas flows through a bank of outlet scrubbers into another common header where it is again commingled. Thence it flows in two lines, each 24 inches in diameter, a distance of about 200 yards to a connection with another line, 30 inches in diameter, through which the gas flows about 100 yards to a bank of 6 sales meters inside the Sherman gasoline plant fence. The point of sale and delivery to plaintiff is at the outlet of said meters which are connected with two pipelines, each 26 inches in diameter, owned and operated by plaintiff.

"The point of delivery into the two pipelines owned and operated by plaintiff is the point at which plaintiff takes delivery from Phillips of such residue gas. Such point is at the outlet of Phillips' Sherman gasoline plant from which the gas flows into the natural gas pipeline system owned by plaintiff extending from such point of delivery through the states of Oklahoma, Kansas, Nebraska, Missouri, Iowa, Illinois, Indiana, Wisconsin, and Michigan. From such point the gas travels through the two 26-inch pipelines referred to a distance of approximately 1215 feet to the compressor station owned and operated by plaintiff at which station the pressure of such gas is raised from approximately 200 pounds to approximately 975 pounds. In the compressor station the gas is compressed, cooled, scrubbed and dehydrated in the course of the flow through the station.

At the outlet of such compressor station, such gas passes [fol. 142] into plaintiff's 24-inch pipeline referred to in paragraph V hereof, flowing through such pipeline approximately 1.74 miles to the Texas-Oklahoma line and continuing through such pipeline to plaintiff's market outside the State of Texas. Phillips is the sole supplier of the gas requirements of plaintiff for its markets.

The movement of such residue gas from the wells where produced to such point of delivery to plaintiff at the outlet of the Phillips gasoline plant, and thence through plaintiff's gas pipeline system to its customers in Iowa, Missouri, Michigan, and Wisconsin, is a steady and continuous flow of such gas in the manner detailed above. Such gas is purchased by plaintiff from Phillips for transportation to points in states other than Texas. The taking of such gas at the outlet of Phillips gasoline plant is accomplished through facilities owned by plaintiff that are used exclusively in connection with such taking and transportation."

Mr. Culton: Now, in connection with "X", we have two exhibits which we would like to have marked. One which we would like to have marked Plaintiff's Exhibit "B" is the map of the portion of the Hugoton Field which I exhibited to Your Honor a few moments ago.

(Said instrument was admitted in evidence as Plaintiff's Exhibit "B", and the same is shown herein at Volume II.)

Mr. Culton: And Exhibit "C" is the schematic layout of Michigan-Wisconsin compressor station and the Phillips gasoline plant adjacent to that station.

[fol. 143] Mr. Looney: Plaintiff offers in evidence Plaintiff's Exhibit "B" and Plaintiff's Exhibit "C", and in that connection in the Stipulation on Page 6 that is referred to as a diagrammatic sketch.

Mr. Culton: Yes.

(Said instrument was admitted in evidence as Plaintiff's Exhibit "C", and the same is shown herein at Volume II.)

Mr. Looney: Plaintiff next offers in evidence from the Stipulation Paragraph XI.

“XI

“The gross volumes of residue gas (in MCF) so taken (Within the meaning of such Section XXIII) by plaintiff from gas produced in Texas at the outlet of such Phillips gasoline plant since such H. B. 285 became effective and reportable prior to the institution of this suit were as follows:

During the month of September, 1951.....	9,671,551
During the month of October, 1951.....	10,321,143
During the month of November, 1951.....	9,834,873
During the month of December, 1951.....	9,645,287
During the month of January, 1952.....	10,056,880
During the month of February, 1952.....	9,683,708
During the month of March, 1952.....	9,983,549.”

Mr. Looney: Plaintiff next offers in evidence from the Stipulation Paragraph XIV, commencing on Page 20.

“XIV

“If such Section XXIII of H. B. 285, on its face or as in-[fol. 144] terpreted by defendants, can lawfully be applied to plaintiff’s operations in so taking such gas as above set forth, then plaintiff is required by such Section XXIII to pay a tax of 9/20 of 1 cent per thousand cubic feet for the gas so taken (except such gas as is excluded under the provisions of such section) as an occupation tax for the privilege of so taking such gas.

“Of the gas so taken by plaintiff, as aforesaid, plaintiff in determining the quantity of gas for purposes of calculating the tax has excluded gas used for fuel in connection with lease or field operations. The quantities of gas so excluded under the express provisions of the Act follow:

September, 1951.....	220,243 MCF
October, 1951.....	236,104 MCF
November, 1951.....	215,785 MCF
December, 1951.....	216,932 MCF
January, 1952.....	220,660 MCF
February, 1952.....	212,455 MCF
March, 1952.....	216,501 MCF

"The net volumes of taxable gas and the taxes payable for each such period, after making the aforesaid exclusions, follow:

Month	MCF	Tax Payable
September, 1951	9,451,308	\$42,530.89
October, 1951	10,085,039	45,382.68
November, 1951	9,519,088	42,835.90
December, 1951	9,428,355	43,427.60
[fol. 145] January, 1952	9,836,220	44,262.99
February, 1952	9,471,253	42,620.64
March, 1952	9,767,048	43,951.72"

Mr. Looney: We offer in evidence from the Stipulation Paragraph XV, Paragraph XVI, Paragraph XVII, Paragraph XIX, Paragraph XX, Paragraph XXI.

"XV

"For each of the aforesaid periods within the time permitted by the Act, plaintiff filed with defendant Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, a report on the form prescribed by that public official showing the volumes of gas so produced in Texas and so taken by plaintiff during the respective periods and, at the same time, plaintiff paid to such officials, as required by him, the respective sums shown in the foregoing paragraph XIV. Such reports were filed and such payments were made as follows:

For the month of September, 1951, on October 24, 1951.
 For the month of October, 1951, on November 23, 1951.
 For the month of November, 1951, on December 20, 1951.
 For the month of December, 1951, on January 24, 1952.
 For the month of January, 1952, on February 25, 1952.
 For the month of February, 1952, on March 25, 1952.
 For the month of March, 1952, on April 25, 1952."

"XVI

"In accordance with the provisions of V. A. C. S. 7057b [fol. 146] (Acts 43rd Legislature of Texas, Chapter 214, as amended), plaintiff, for each of the periods aforesaid and within the time permitted by law, at the time of filing its

such reports and paying to the Comptroller of Public Accounts the taxes, filed with said Comptroller its formal written protest in which plaintiff set out fully and in detail the grounds and reasons why plaintiff contends that such tax and the demands for payment thereof under the interpretation of such Section XXIII by defendant, or under any other interpretation thereof, are unlawful and unauthorized."

"XVII

"Plaintiff pays to the State of Texas the general ad valorem tax imposed by the state on all its physical properties located within the state, and the producers of all natural gas produced in Texas, the residue from which is taken by plaintiff at the outlets of the gasoline plant herein referred to, have paid the production tax on the natural gas so produced by them, and such producers have paid ad valorem taxes on all leases from which such gas is produced."

"XIX

"The grounds and reasons so set forth in such protest are as follows:

"1. As applied to the residue gas of which this company (plaintiff) 'takes' possession near the outlet of Phillips gasoline plant, such so-called 'gathering tax' imposed under H. B. 285 is an attempt by the state to levy a tax on the purchase of gas for immediate transportation in interstate commerce, on the privilege of purchasing gas in interstate commerce, on the entry of gas into interstate commerce, and on the activity or occupation of engaging in interstate commerce. Such tax, therefore, is violative of subdivision 3 of Section 8 of Article 1 (the commerce clause) of the Constitution of the United States.

"2. While denominated a 'gathering tax,' the tax provided for in Section XXIII of H. B. 285 is not, in fact, a tax upon the exercise of the function of gathering gas, as that term is consistently used in the industry, but it is one, as applied to the operations of this company (plaintiff), upon the act of taking gas into interstate commerce. Such tax is, therefore, violative of subdivision 3 of Section 8 of

Article 1 (the commerce clause) of the Constitution of the United States.

"3. The so-called 'gathering tax' imposed by Section XXIII of H. B. 285 is violative of subdivision 3 of Section 8 of Article 1 (the commerce clause) of the Constitution of the United States as applied to the operations of this Company (plaintiff), in that it is levied upon a movement of goods in interstate commerce during the course of such commerce, and is a tax upon the occupation of transporting goods in interstate commerce.

"4. As applied to the residue gas so taken and purchased by this company (plaintiff) from Phillips, such tax is not [fol. 148] imposed on the one who really gathers gas, either natural or residue, as that term is consistently used in the industry. This company (plaintiff) has no part in the gathering of such natural gas and owns no part of the facilities by which such gas is, in fact, gathered. The imposition of such tax upon this company (plaintiff) is therefore violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States and of the due process section (Article 1, Sec. 19) of the Constitution of the State of Texas.

"5. The requirement of such Section XXIII of H. B. 285 that this company (plaintiff) pay a gathering tax on the residue gas which it purchases from Phillips, as aforesaid, is unreasonable, arbitrary and violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States and of the due process section of the Constitution of the State of Texas (Article 1, Section 19), since such gas is not gathered, in fact by this company (plaintiff) and this company (plaintiff) performs no function with respect to the gathering of such gas.

"6. Such Section XXIII of H. B. 285 is vague, indefinite, unintelligible and incapable of uniform application. It is therefore violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States and of the due process Section (Article 1, Section 19) of the Constitution of the State of Texas."

[fol. 149]

"XX

"Defendant Robert S. Calvert, as Comptroller, in accordance with such V. A. C. S. 7057b, has transmitted to defendant Jesse James, State Treasurer of Texas, the sums of money received from plaintiff as set forth in numbered paragraphs XIV and XV hereof and informed such Treasurer in writing that such money was paid under protest, and such Treasurer has in all things complied, as to such payments, with the provisions of V. A. C. S. 7057b applicable thereto."

"XXI

"Ninety days did not elapse after the date of any such payment of taxes and the filing of such protest before the filing of suit by this plaintiff for the recovery thereof."

Mr. Looney: The Plaintiff rests, Your Honor.

Mr. Mathews: The Defendants offer in evidence Paragraph XII, which is the same as the one that was read to His Honor yesterday in connection with the Panhandle Eastern; Paragraph XIII and Paragraph XVIII.

"XII

"1. In the West Panhandle and Texas Hugoton gas fields there is some acreage which is not contracted for a long period of time, and there is some acreage which is not contracted or dedicated to anybody. If the producers in such respective fields shall hereafter, in the aggregate, produce greater quantities of gas than are being produced [fol. 150] at the present time, the net result will be the depletion of the field at an earlier date than now appears likely if the production shall, in the aggregate, remain as it now is. If this happens, no purchaser of gas will be able to fill its market demand over as long a period of time as it could if the production should remain what it is now. There is now more room in such fields for more production than is currently being taken from the wells. Under the Texas Oil and Gas Conservation Statutes, it is provided in Section 15 of V. A. C. S., Article 6008, that 'in all common reservoirs producing both sweet and sour gas no gas well shall be permitted to produce in excess of 25 per cent of its daily productive capacity.' Since both the West Pan-

handle Field and the Texas Hugoton Field constitute common reservoirs producing sweet and sour gas, that statutory limitation is applicable to the wells in those fields. Such Section 15 of Article 6008 also provides that the Commission upon a finding that reservoir conditions require that such percentage be increased to prevent waste, and that such increase will not create a drainage condition as between sweet and sour gas lands, the Commission may authorize an increase in such allowable production. Such section also provides that when the allowable production allocated to any well is more than 15 per cent of its daily producing capacity and the Commission finds that the production of its daily allowable will cause waste due to the intermingling of sweet and sour gas, the Commission may order the production from such well restricted to 15 per cent [fol. 151] of its daily producing capacity.

"2. Many of the wells in the West Panhandle and Texas Hugoton Fields could now produce at a greater rate under the oil and gas conservation laws if there were a greater market demand; but some wells in such fields could not produce at rates greater than they are now permitted to produce, whatever the demand, because of the 25 per cent statutory limitation above referred to. The laws and regulations in Texas are designed to give the opportunity of producing ratably from the reservoirs, but it is up to the producers in each case to take advantage of the opportunity. The length of time a supply of gas will be available to a producer cannot be determined by dividing the estimated volumes of gas in place under his leases by the current daily market requirements. The volumes of gas a producer can produce in the future depends not only on the amount of the production of such producer and his own nominations but also upon the nominations of others who need gas and of the allocations to producers from whom they purchase. Under the Texas proration laws and regulations of the Commission, there are conditions in procedure of proration and the allocation of demand which make it possible at the election of the supplier of the market to avail himself of means for getting the gas he requires, but he then must make moves on his own part, else he doesn't get the gas currently. Thus, Section 18 of Article 6008, Vernon's Statutes, provides that when unforeseen con-

tingencies increase the demand for gas required by any distributor, transporter or purchaser, to an amount in excess [fol. 152] of the total allowable production of the wells to which he is connected, he is authorized to increase his take ratably from all such wells in order to supply his demand for gas, provided that notice of such increase be given to the Commission within five days and further that the Commission at its next hearing shall adjust the inequality of withdrawals caused by such increase in fixing the allowable production of the various wells in the common reservoir. Section 20 of such Article 6008 provides that if any owner of any gas well has failed or refused to utilize or sell the allowable production from his well, when such owner has been offered a connection or market for such gas at a reasonable price, such well shall be excluded from consideration in allocating the daily allowable production from the reservoir until the owner thereof signifies to the Commission his desire to utilize or sell such gas, and that in all other cases all gas wells shall be taken into account in allocating the allowable production among wells producing the same type of gas. If a particular purchaser nominates an additional quantity of gas per day, the increased nominations would be allocated to all of the wells in the field which is a proration unit, and as many of those wells belong to producers other than a producer supplying such purchaser, such other wells would be allocated their proportionate part of any such added requirements. The producer would have to own the proration unit 100 per cent before he could produce the entire amount of gas to fill such increased market [fol. 153] demand from his own wells over any period of time. In the event, because of such unforeseen contingencies, a purchaser should increase his demand to an amount in excess of the total allowable production of the wells to which he is connected, then under the conservation statutes and rules and regulations of the Railroad Commission, such purchaser supplying such market could supply such increase, subject to adjustment, by the Commission at the next hearing; but if there was a continuing market demand for such increase, such market increase would go into the total market and all would be allocated to all of the producers in the field in accordance with the provisions of the Commission's regulations.

"But for the Texas oil and gas conservation statutes, and the enforcement by the Railroad Commission of Texas, producers in the field could drill as many wells as they desired and could open their wells at the rate of 100% open flow and could burn both the sweet and sour gas for the production of carbon black, or they could extract the gasoline and other liquid hydrocarbons in a gasoline plant and flare the residue gas. If this happened, the gas in the reservoir would become depleted in the course of a few years. If only a portion of the producers in the field drilled additional wells and operated such wells at 100% open flow, such producers would in the course of a few years drain the gas from under the acreage of the producers who were not also producing at 100% open flow from a proportionate number of wells. After such field should be depleted, neither Michigan-Wisconsin nor any other purchaser of gas could supply its market demand with gas from such fields and the same [fol. 154] would be true with respect to any other field in the state which might be subjected to the same rapid depletion in the absence of the Texas oil and gas conservation statutes and the enforcement thereof.

"3. At the time negotiations were had between Phillips and Michigan-Wisconsin, estimates were made by the respective parties as to the gas content in the reserves dedicated to the purchaser by such contracts and of the period of time such reserves would continue to last under then existing production conditions in the fields in which such reserves were located. And after exercising its own judgment as to whether or not total production would probably increase or decrease in the future, plaintiff reached the business judgment that the reserves would be available to it long enough to justify economically the construction and operation of the additional facilities required to handle such gas being purchased. It was then estimated that gas would be available from such reserves for approximately 20 years, but the purchaser took its chance as to whether or not the fields would be depleted prior to such anticipated date, or would last longer than estimated.

"At the time such contracts were entered into, neither the sweet gas portion of the Panhandle field nor the Texas portion of the Hugoton field had been subjected to proration by orders of the Railroad Commission of Texas, ex-

cept as its orders implemented the statutory 25 per cent [fol. 155] limitation on production. Prior to the issuance by the Railroad Commission of Special Order No. 10-13,196, dated September 24, 1948, adopting operating field rules for the West Panhandle Gas Field, consisting of Carson, Gray, Hartley, Hutchinson, Moore and Potter Counties, Texas, effective October 1, 1948, as amended by orders effective January 10, 1949, and September 1, 1949, there was no order of the Railroad Commission of Texas prorating sweet gas in the West Panhandle Gas Field.

"The proration of sour gas in the West Panhandle Field prior to October 1, 1948, was under the basic order, dated May 4, 1938, fixing the daily allowable production and method of allocation of sour dry natural gas in the field. This basic order was the result of the passage of Senate Bill 407 at the regular session of the 45th Legislature, and of House Bill 266 at the regular session of the 44th Legislature and public hearings held by the Commission on or before the twentieth day of each calendar month, including hearings held in Austin, Texas, on November 19 through 21, 1935; April 13, 1937; June 18, 1937; and February 18, 1937, and the hearings held in Amarillo, Texas on July 24, 1937; August 27, 1937; September 30, 1937; February 22, 1938; and March 25, 1938, with respect to the existence and imminence of waste of natural gas in the State of Texas and the existence of undue drainage between properties in gas fields in the State of Texas.

"By Special Order No. 10-13,196, it was ordered by the Commission that the two areas of the Panhandle Field [fol. 156] which had by common usage come to be identified as the 'West Panhandle Sweet Gas Field' and the 'West Panhandle Sour Gas Field' be consolidated for operational and developmental purposes as 'West Panhandle Gas Field.' In consolidating the two areas the Commission found that the gas wells producing in the sweet and sour gas areas were producing from a common reservoir; that there was undue preventable and cognizable drainage of gas between tracts of diverse ownership and such undue preventable and cognizable drainage was the result of disproportionate, nonuniform and unratable withdrawals of gas as between properties and wells in the field. The Commission found further that in order to prevent undue and cognizable drain-

age of gas across property lines then taking place and to obviate the confiscation of property resulting from such undue and cognizable drainage, it was necessary to adopt a gas allocation formula to apply uniformly to the 'West Panhandle Gas Field' as a whole and without regard to the sulphur content of the gas. The Commission then by the adoption of Rule 2 in Special Order No. 10-13,196 adopted the $\frac{1}{2}$ - $\frac{2}{3}$ gas allocation formula which had been found theretofore under the basic order of May 4, 1938, as applied to the proration of sour gas production to be best suited to prevent cognizable and preventable drainage, tend to reduce drainage and the creation or accentuation of low pressure areas, and reduce drainage across property lines.

"Proration orders affecting the sweet gas portion of [fol. 157] the Panhandle Field and the Texas portion of the Hugoton Field entered in 1948 were not designed to preserve the supply of any purchaser of gas for any particular time, but were only designed to prevent waste and adjust correlative rights of all producers in each of such fields to produce their fair share of all gas produced from such fields for the aggregate markets supplied therefrom. Neither Michigan-Wisconsin Pipe Line Company nor any other purchaser, had any guaranty under the terms and provisions of the Texas Conservation Law either before or after the issuance of regulations by the Texas Railroad Commission that a particular supply of gas would be available to them for any particular period of time. A copy of the orders of the Railroad Commission referred to in this subdivision is attached hereto as Exhibit 'E'."

"XIII

"1. The Railroad Commission of Texas, under its rule-making power as provided for in Section 9 of Article 6008, Vernon's Civil Statutes of Texas, promulgated rules 8 and 21, which read as follows:

"Rule 8. Gas to be metered.

"(a) All natural gas produced from gas wells in this State shall be accounted for by measurement and reported to the Commission by the producer or purchaser of gas.

"(b) All natural gas produced from oil wells in this

State and sold, processed for its gasoline content used [fol. 158] in a field other than that in which it is produced, or used in recycling or repressuring operations shall be accounted for by measurement and reported to the Commission.

“(c) All natural gas produced from oil wells in this State which is not covered by the provisions of Rule 8-B, above, but which is used as fuel shall be accounted for by measurement or accurate estimate based on its use and reported to the Commission.

“(d) Natural gas delivered at the well and required to be reported under this rule shall be reported to the Commission by the gasoline plant, gas pipe line company, or other person taking the gas.

“Natural gas produced from the well and required to be reported under this rule which is not delivered to and reported by a gasoline plant, gas pipe line or other person shall be reported to the Commission by the producer or well owner.

“The record of all measurements or estimates required by this rule shall be maintained in a permanent file and made available to the Commission representatives at all times.

“Rule 21. Separating devices and tanks.

“Where oil and gas are found in the same stratum and it is impossible to separate the one from the other, or when a well has been classified as a gas well according to Commission Order No. 20-550 dated January 18, 1939, and title ‘General Order Classifying Wells Producing Condensate in the State of Texas,’ or where a well has been classified as [fol. 159] a gas well under the Statute and such gas well is not connected to a recycling plant and such well is being produced on a lease and the gas utilized under Article 6008, the operator shall install a separating device of approved type and sufficient capacity to separate the oil or liquid hydrocarbons from the gas, which separating device shall be kept in place as long as a necessity therefor exists, and after being installed such device shall not be removed nor the use thereof discontinued without the consent of the Railroad Commission of Texas. All oil and/or distillate or

any other liquid hydrocarbons as and when produced shall be adequately measured according to the pipe line rules and regulations of the Commission before the same leaves the lease from which they are produced and sufficient tankage and separator capacity shall be provided by the producer to adequately take daily *guages* of all oil distillate and/or liquid hydrocarbons and gas produced.'

"2. In a plant that removes or extracts gasoline or liquid hydrocarbons from gas by the scrubbing or absorption processes, the gas is often run through a compressor which collects and compresses the gas. The gas then passes through a cooler to remove the heat of compression, and then passes into the lower part of an absorbing tower from where the gas passes upward counter-current to the descending absorbent through packing or baffling.

"3. The State of Texas, through the Railroad Commission of Texas, exercises under the Texas State Oil and Gas Conservation statutes, certain jurisdiction over plants that [fol. 160] remove or extract gasoline or other liquid hydrocarbons by the scrubbing or absorption processes.

"4. The Railroad Commission of Texas, by an order dated December 19, 1938, as amended on January 25, 1939, requires that all natural gas entering and leaving plants that remove or extract gasoline or other liquid hydrocarbons from gas, whether by the scrubbing, absorption, compression, or other process, as well as all liquids recovered at such plant, must be metered or otherwise measured in accordance with the Railroad Commission's rules and regulations, and the operators of such plants are required to obtain a certificate of compliance from the Commission.

"5. Neither the Congress of the United States, the Federal Power Commission, or any other Federal agency has by any law, rule, or regulation, exercised any control over the installation and operation of the plants that remove and extract the gasoline and liquid hydrocarbons from the gas that is taken by plaintiff at the outlet of the Phillips Gasoline Plant.

"5a. Neither the Congress of the United States, the Federal Power Commission, or any other Federal agency has by any law, rule or regulation exercised any control over the installation and operation of the plants that remove and extract the gasoline and liquid hydrocarbons from the

gas that is taken and retained by plaintiff at the outlet of the Phillips Gasoline Plant.

[fol. 161] "6. The only plants commercially used in Texas to extract the liquid hydrocarbons therefrom are those specifically mentioned in paragraph (c) of Section XXIII of H. B. 285.

"7. The State of Texas, through the Railroad Commission of Texas, under and by virtue of the Texas State Oil and Gas Conservation statutes, exercises certain controls over the drilling, completing, and producing of oil and gas from the earth and waters of this State.

"8. Neither the Congress of the United States, the Federal Power Commission, or any other Federal agency, has by any law, rule, or regulation, exercised any control over the drilling, completing, or producing of oil and gas from the earth and waters of this State.

"9. Where gas contains an appreciable amount of liquid hydrocarbons therein, it is sometimes found economically expedient to separate the liquid hydrocarbons therefrom in order that the gas may be transmitted through a pipeline any considerable distance most economically.

"10. The Gas Contract between plaintiff and Phillips Petroleum Company, which is attached to these Stipulations as Exhibit A, provides in Article VI as follows:

" 'Article VI

'Quality

" '1. All gas delivered by Seller under the terms of this contract shall conform to the following specifications:

[fol. 162] " '(a) Odors and Solids. The gas shall be commercially free from objectionable odors, solid matter, dust, gums and gum-forming constituents which might interfere with its merchantability or cause injury to or interfere with proper operations of the line, regulators, meters or other appliances through which it flows.

" '(b) Oxygen. The gas shall not at any time have an oxygen content in excess of one per cent by volume, and Seller shall make every reasonable effort to keep the gas free of oxygen.

" '(c) Liquids. The gas shall be free of water and hydrocarbons in liquid form.

" '(d) Hydrogen Sulphide. The gas shall not contain

more than one grain of hydrogen sulphide per one hundred cubic feet.

“(e) Total Sulphur. The gas shall not contain more than twenty grains of total sulphur (hydrogen sulphide and mercaptan sulphur) per one hundred cubic feet.

“(f) Heating Value. The gas shall have a total heating value per cubic foot of not less than nine hundred seventy nor more than one thousand twenty British thermal units, the term ‘total heating value per cubic foot’ meaning the number of British thermal units produced by the combustion, at constant pressure, of the amount of gas free from water vapor which would occupy a volume of one cubic foot at a temperature of sixty degrees Fahrenheit and under the standard gravitational force (the acceleration 980.665 c.m. per sec.) with air of the same temperature and pressure [fol. 163] as the gas, when the products of combustion are cooled to the initial temperature of gas and air and when the water formed by combustion is condensed to the liquid state. If the gas tendered for delivery by Seller to Buyer under this contract shall have a total heating value per cubic foot of less than nine hundred seventy British thermal units, Seller shall at its own expense take such steps as shall be necessary to supply the deficiency in British thermal units.

“2. Within the limits of the minimum heating value specifications above, Seller shall have the right to remove from the gas delivered hereunder any constituents thereof other than methane, and shall have the right to remove such methane as is necessarily removed from the gas in the process of removing other constituents.’

“11. Sour gas in its natural state can be used in the manufacture of carbon black and can be used in gas lift operations of oil and gas wells, but frequently the content of the sulphur and sulphur compounds is such that the gas is not desirable for use in domestic fuel operations because of the toxic and corrosive nature of Hydrogen Sulphide gas. However, frequently such sour gas, when commingled with sweet gas may be satisfactory for such purposes.

“12. Such sour gas in order to make it most desirable for use as light or fuel for industrial or domestic purposes is subjected to a de-sulphurization process.

"13. Neither the Congress of the United States, the Federal Power Commission, or any other Federal agency has, by any law, rule, or regulation, exercised any control over [fol. 164] the removal of either hydrogen sulphide or sulphur from gas produced from the waters or earth of the State of Texas.

"14. That attached hereto and marked Exhibit E is a true, complete, and full copy of certain rules and regulations promulgated by the Railroad Commission of Texas, as authorized by Article 6008, Vernon's Civil Statutes of Texas, relative to the enforcement of the Texas Oil and Gas Conservation statutes. Under the laws of the State of Texas, such rules and regulations, when valid, have the same force and effect as the statutes themselves."

"XVIII

"During the month of December, 1951, there was produced from approximately 8,275 gas wells and from approximately 76,770 oil wells in Texas 435,972,937,000 cubic feet of gas. This volume of gas was disposed of approximately as follows:

	Cubic Feet	Per Cent Of Total
Shrinkage in gas volume due to removal of liquifiable hydrocar- bons	14,490,220,000	3.32
Plant Fuel and Lease Use	32,455,266,000	7.45
Gas Lift	15,266,874,000	3.50
Pressure Maintenance and Re- pressuring	25,093,110,000	5.76
Cycled	43,754,408,000	10.04
Manufacture of Carbon Black	26,036,664,000	5.97
[fol. 165] Vented and Lost in Lines	4,022,759,000	.92
	168,555,284,000	38.66
Gas taken and retained for trans- mission under provisions of H. B. 285 and consumed in Texas	106,298,350,000	24.38
Gas taken and retained for trans- mission under provisions of H. B. 285 and consumed in States other than Texas	168,555,284,000	38.66

“The gas volumes above stated were figured at a standard pressure base of 14.65 pounds per square inch absolute and a flowing temperature of 60 degrees fahrenheit.

“As reflected above, approximately 2/5 of the gas that is subject to tax is consumed in Texas, and approximately 3/5 of the gas that is subject to the tax as levied by H. B. 285 is consumed in States other than Texas.

“That during each of the months of September, 1951, October, 1951, November, 1951, January, 1952, February, 1952, and March, 1952, approximately the same volume of gas was produced from approximately the same number of gas and oil wells and the gas produced in each of said months was disposed of for the same uses and in approximately the same percentages as state above for the month of December, 1951.”

Mr. Mathews: Now, in connection with Paragraph XII, the State has had marked for identification as Defendants' Exhibit I-A, I-B and I-C that which is referred to in the Stipulation as Exhibit “E”, and we now offer in evidence as Defendants' Exhibit I-A, I-B and I-C, those Orders of the [fol. 166] Railroad Commission, subject, of course, I am sure to some objection.

Mr. Culton: In this connection, the record might show that in some way we failed to change our exhibit numbers, and there is no exhibit “D”.

Mr. Mathews: That is correct.

Mr. Culton: Attached to the Stipulation, and instead of going back and changing the Stipulation, we just left the “E” as it is.

Mr. Looney: Your Honor, as to each of the paragraphs of the Stipulation offered by the Defendant and the exhibits in connection therewith offered by the Defendants, we have the objection that the testimony and the exhibits are immaterial and irrelevant to any issue in this case, and we don't care to be heard on it, and will take care of that when we get to the argument.

(Said instruments were admitted in evidence as Defendants' Exhibits I-A, I-B, and I-C, and the same are shown herein at Vol. I, Pages 175, 191 and 196, respectively.)

General Daniel: Now, it is agreeable with you all to stipulate that Mr. Murray's testimony may be made a part of the record in this case?

Mr. Culton: As if it were given in this case.

General Daniel: As if it were given in this case, the same evidence with the same objections as in the Panhandle [fol. 167] Eastern case.

Mr. Culton: And the same cross also.

Mr. Mathews: Cross and recross.

Mr. Culton: The same showing as to his testimony.

General Daniel: In bulk.

Mr. Looney: If the witness is recalled for further cross-examination, that will go in this case as well as in the Panhandle Eastern case.

Mr. Mathews: In connection with the agreement which has been made regarding Commissioner Murray's testimony on direct and cross and redirect and recross, the State offers in connection with this record the Defendants' Exhibit 2, the nomination report testified to by Mr. Murray.

(Said instrument was admitted in evidence as Defendants' Exhibit No. 2, and the same is shown herein at Vol. I, Page 201.)

[fol. 168] WILLIAM J. MURRAY, JR., a witness produced by the Defendants, having been by the Court first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Geppert:

Q. State your name and residence.

A. William James Murray, Jr.; residence is Austin, Texas.

Q. Mr. Murray, what is your occupation or profession?

A. I am a petroleum engineer by profession. I am a Railroad Commissioner by occupation.

Q. State your educational background and experience as a petroleum engineer.

A. I have—

Mr. Looney: Your Honor, we are perfectly willing to stipulate his qualifications as a qualified witness, if that will save some time.

Mr. Geppert: That will be all right.

Q. I believe you stated that you held the position of Railroad Commissioner of the State of Texas?

[fol. 169] A. Yes.

Q. How long have you held that position, Mr. Murray?

A. Since January, '47.

Q. State briefly your duties as a member of the Railroad Commission.

A. That is kind of hard to do briefly.

Q. Well, as briefly as you can.

A. We have jurisdiction over the field of public transportation, oil and gas, gas utilities and the new liquefied petroleum gas division.

Q. Now, with specific reference to the oil and gas industry in Texas, I will ask you to state what phases of that industry are regulated by the Railroad Commission.

A. All phases of the oil and gas industry, or possibly that is not an accurate answer. We regulate production, transportation and refining of oil, production, processing, transportation of natural gas. Our primary concern is relative to conservation in production of oil and gas.

Q. I will ask you to state if the Railroad Commission in its regulation of—Does it regulate the drilling, equipping and producing of both oil and gas and the gas wells of Texas?

A. Yes, we do.

Q. And in doing that do you have any safety measures that you prescribe or conservation measures?

A. We have many conservation measures. Some measures such as the requirement of blow-out preventers on wells likely to encounter high pressure oil or gas bearing horizons [fol. 170] might be called safety measures, and also be considered a conservation measure. Now, we don't go into safety measures from the standpoint of protection of workmen. That is done by other regulatory bodies, but our concern is conservation, and certain of our conservation measures are also safety measures.

Mr. Looney: Your Honor, we want to object to all of this testimony, without repeating it from time to time, on the

basis that it has no material bearing or relevancy on the question as to whether or not this tax is laid on interstate commerce of the purchase of gas for interstate commerce, and with the understanding that we have the objection, we don't care to argue it. The argument we will withhold until the whole case is argued.

The Court: All right. The objection is overruled.

By Mr. Geppert:

Q. I will ask you this question, Mr. Murray. In enforcing the certain conservation measures, do you regulate in that connection the spacing of oil and gas wells?

A. Yes.

Q. Explain how that is done and what the purpose of it is.

A. When a new oil or gas field is discovered, the Commission holds a hearing and determines what an efficient drainage pattern per well will be, and then provides spacing rules for the oil or gas field in accordance with the engineering and geological testimony adduced at the hearing.

Q. What is the effect of that regulation?

[fol. 171] A. It is to provide the maximum unit upon which—for which a credit may be received for an oil or gas well. If I might state that in a gas field we might after hearing issue a 640 acre spacing rule. In times past that has meant that you could not get credit in your allocation formula for more than 640 acres. Currently, with the current steel shortage, our maximum is also a minimum. You cannot drill more than one well to 640 acres, nor can you get credit for more than 640 acres. In times past we restricted the amount of acreage that could be assigned a well but would permit additional wells to be drilled if the operator elected.

Q. In the oil or gas industry what is known by the term "proration" and in what manner is that regulated or controlled by the Railroad Commission?

A. Proration is restriction of the production rate from an oil or gas well to less than the physical capacity of that oil or gas well to produce.

Q. What is the purpose of a regulation like that?

A. It is to prevent physical waste.

9—198-201

Q. I might ask you to state what constitutes physical waste?

A. Physical waste has been defined by the statutes as being both above ground and under ground wastage. I shouldn't define waste with the term waste, but I am momentarily at a loss for another word. It is both the underground and above ground preventable loss of these hydrocarbons, and in addition, it is production in excess of the reasonable market demand. In other words, it can be shown [fol. 172] that when you produce above market demand, these above or below ground physical wastes take place, but the Court, without having to spell that out, the Legislature has passed a law, and the Courts have sustained it, that per se production above market demand is physical waste.

Q. You state awhile ago—

A. If I might clarify my earlier answer; therefore, I stated that the purpose of proration is to prevent physical waste, and that is including the reduction to market demand, and I might say it another way, that it is to prevent wells from producing at such rates as would damage the reservoir and cause loss of recoverable hydrocarbons or producing at such rates as would produce more gas than for which there exists a reasonable market demand.

Q. I believe you stated awhile ago that you considered conservation your primary function in the enforcement of the oil or gas regulatory laws. What do you consider your secondary function, if you have one?

A. I would say that the secondary function would be to assure that an adequate supply of oil and gas is available to the consumers within the State and without the State at all times. Some might say that our secondary function was to see that equity was preserved between the producers. I would consider that probably the third function of the Commission, if I were rating them by importance. First, conservation, second, assurance of an adequate supply to meet the markets at all times, and, third, protection of cor-[fol. 173] relative rights between producers.

Q. I will ask you to state what is meant by the term casinghead gas and distinguish it from the term dry natural gas.

A. Casinghead gas is natural gas produced incident to

the production of oil. It is no difference in chemical or physical properties from natural gas produced from a gas well, but by definition, if it is produced incident to production of oil from a well producing with a ratio of more than one barrel of oil per each 100,000 cubic feet of gas, then that well is a statutory oil well, and the gas produced from that well is by statute defined as casinghead gas. If the gas is produced from a well which produces less than one barrel of oil per 100,000 cubic feet of gas, then that is a statutory gas well, and by definition that gas is natural gas, and it is termed sweet or sour natural gas, depending upon the composition of it, the presence of hydrogen sulphide in the gas.

Q. During the past few years has the Railroad Commission had any conservation problems in reference to physical waste of either or both of casinghead gas or dry gas?

A. Yes, we certainly have.

Q. Would you mind just stating what those conservation problems have been?

A. I hesitate for fear my answer might be overly prolonged. I know the Court is familiar with the problems we have been up against, but in brief, first, there existed conservation problems relative to the production of gas from [fol. 174] a gas well. In times past when there existed no immediate market for the gas that could be produced from a gas well, operators in order to obtain immediate revenue would produce such gas wells and flare the gas to the air but recover the slight amount of liquid hydrocarbons that could be obtained by passing this gas through a separator. It was a very small percentage of the total hydrocarbons, but it did furnish some immediate revenue, and that was a terrible abuse of times past. That was corrected. Then, there still remained the wastage of casinghead gas. You can't produce oil without producing casinghead gas, and there frequently existed no immediate market for casinghead gas, and for a long time it was felt that it was necessary to go ahead and produce the oil, and there wasn't anything to do with casinghead gas but to flare it, but great progress has also been made in the utilization of this formerly wasted casinghead gas.

Q. What has the Railroad Commission done in the past

and now doing in order to try to remedy those problems, to meet those conservation problems?

A. My most intimate acquaintance is with the problems recently relative to casinghead gas.

Q. Yes.

A. I have some recollection of it with gas well gas. The Commission, I forget just what steps, but one fundamental step was the passage of a law by the Legislature prohibiting the flaring of sweet natural gas. So that went a long ways toward solving that wastage of natural gas, which at [fol. 175] times was terrifically high in the State of Texas. Now, in recent years the Commission has (1) tried every way in the world to encourage the utilization of casinghead gas, and at one time we issued seventeen so-called flare gas orders or shut-down orders requiring seventeen different fields to be shut in until the casinghead gas which those fields were producing was utilized. Far more in cooperation and working with industry and helpful regulation, permissive regulations, encouragement, has this casinghead gas utilization been accomplished, but to a good extent by the mandatory action and the threat of mandatory action we are today utilizing something in the range of three billion cubic feet of casinghead gas daily that once was flared, and thereby have tremendously added to the ultimate gas reserves of our state.

Q. As a result of those conservation measures of the Railroad Commission, what effect, if any, does that have upon the purchasers of gas to be put in transmission lines to be sent off of market? Does it increase the gas to be available to them?

A. Vastly so. Something in the range of three billion feet of gas a day is being taken, casinghead gas or oil well gas, and that reduces by that amount the quantity of gas well gas that is withdrawn, and the less gas well gas you take, the longer it is going to last, and likewise, we have tremendous reserves of casinghead gas which in times past would have been, it was thought necessary, had to be flared, but now a great deal of it is utilized. One example, the El [fol. 176] Paso Natural Pipeline, a major portion of the gas that they take into their pipeline and the reserves dedicated to that pipeline, which gives it a sufficient amount of

reserves to justify the construction of the pipeline, comes from oil fields.

Q. In reference to the West Panhandle Gas Field and the Hugoton Gas Field, would you give a rough estimate of how much gas was being flared there a day before the Railroad Commission took steps to eliminate that wastage of gas and the flaring of gas?

A. Well, now, let me eliminate the Hugoton Field and the Panhandle Field, back at the time the Legislature passed the law prohibiting the flaring of gas from a natural gas—from a sweet gas well——

Mr. Culton: That was 1935, wasn't it?

A. I believe that is about right. I am sorry not to be more exact on my recollection of dates. Excuse me. From a gas well. I didn't mean to limit it to a sweet gas well. The Legislature said, "You cannot flare gas from a gas well." At that time there was in the range of a billion cubic feet of gas being flared from the Panhandle Field alone from gas wells. Now, the Legislature——

General Daniel: How often?

A. Daily. A billion cubic feet in terms of—I don't know whether a billion means a whole lot. I guess it does to everybody here, but that would be probably, oh, equivalent to 125 or 150,000 barrels of oil a day being flared or run down a creek, in heating value.

[fol. 177] Q. I will ask you to state if at this time through the efforts of the Railroad Commission if that wastage of gas and flaring of gas in the Panhandle Field and other fields in Texas that they have been flaring has been practically eliminated?

A. There is very little gas well gas being flared in the entire State of Texas. There probably is not as much—there is probably only a small—a few percent as much gas well gas being flared in the entire State of Texas as once was flared in the Panhandle Field alone.

Q. I believe you stated a while ago that these conservation measures of the Railroad Commission will result in the oil and gas being available for a longer period of time. I believe you stated that?

A. Yes, very definitely.

Q. I will ask you to state how much action has, if it does, and will benefit those people or corporations who take and retain gas for transmission in either intrastate commerce or in interstate commerce from Texas gas reserves; how will it affect them? Will it benefit them in any way?

A. Very definitely, in my judgment. Of course, our thinking is generally geared to the benefits to the State of Texas, to the consuming public in Texas and throughout the nation. By stopping this flaring of gas we are going to have supplies of natural gas for many years longer adequate to serve consumers in the state and throughout the nation, but, now, answering specifically your question, our concern is largely toward protecting the consumer. I said that earlier, that [fol. 178] that, I thought, was the second most important function of the Commission, but there is a tremendous investment in an inter or intrastate gas pipeline system, and that system has to be operated over a period of years in order to amortize the investment. You cannot afford to build a pipeline into a gas producing area unless you have assurance that it is going to last in the range of fifteen to twenty-five years, and after you have amortized your line, the more years those reserves last the more profit you can make out of it or the better chance you have got of paying out the investment, so every year of reserves you add, you greatly benefit those companies which have a huge investment in their pipeline system, and it has got to operate over a number of years in order to pay them out, and if they can operate over a much longer period of time, they have got a chance for a very substantial profit. Does that answer the question?

Q. Yes. I will ask you to explain—I think you touched on it awhile ago; you may want to go into it further—what is meant by underground waste and what the Commission has been doing in the past and is now doing in order to try to eliminate it as to both oil and gas?

A. I hesitate again, not wanting to burden the Court with too long an answer, and yet that is in my field especially, and it is hard to be brief there. We have recovered to date from the oil fields in the nation, it has been estimated by outstanding authorities, approximately one barrel out of every five that was found. The other four were left behind [fol. 179] underground. Now, much of that oil can be re-

covered in the fields we are discovering today, this oil that hitherto has been left behind. It is possible, it is economically sound to recover that oil, and, therefore, one of the factors of underground waste is the loss of recoverable oil, oil which it is economically possible to recover but because of lack of adequate regulation, conservation regulation, is not recovered. Now, it is never going to be possible to get every last barrel of oil, and so those barrels that it is impossible to recover I don't as an engineer regard as waste, but when we leave underground oil that could be recovered, I regard that as underground—preventable underground waste. Now, in brief, that is the situation with regard to oil fields. I might explain why the oil doesn't come out. Oil is not, as commonly thought, does not occur in underground rivers or lakes or pools. Our nomenclature "oil pool" is an unfortunate one. It is in a tight rock down there and is held down there much like water in a sponge, and you have got to have some energy to push that water out of the sponge—oil out of the rock to get it into the bore hole, and you stop producing an oil *when* not when you run out of oil but when you run out of energy, and therefore the Commission is endeavoring to conserve in every way possible the natural energy resources of an oil field, and also to encourage artificial, where necessary, artificial injections from outside sources of energy in order that instead of getting one barrel out of five we may get two, three, four or maybe even sometimes *four* barrels out. So much for [fol. 180] oil, if that is an adequate energy. Underground waste in a gas field—Associated with gas or hydrocarbons referred to as liquefiable hydrocarbons. Now, I want to distinguish between liquefiable and liquid. In many deep gas reservoirs a portion of the hydrocarbons underground are in the gaseous phase in the reservoir, but when produced to the surface under surface temperatures and pressures a portion liquefies, and that is called condensate. Now, if you produce in a gas field improperly, you can so reduce the pressure underground that these valuable liquids, liquefiable constituents, drop out in the reservoir, and you loose them down there. After they liquefy, you can get a little of them out, but most of them it is like pouring a gallon of kerosene into a bucket of dry sand and then trying to get the kerosene out. Gas, natural gas, doesn't wet a rock, and

if you have your condensate drop out of the gaseous phase and become liquid in the reservoir, then it wets the rock, and you don't get much of it out. So, prevention of underground—Excuse me. You didn't ask me prevention. Underground waste in a natural gas reservoir, one principal phase of it is in the retrograde, it is called, condensation of these liquefiable contents. Now, you can also produce a gas reservoir so as to lose recoverable gas, and by gas I am distinguishing from the liquefiable content. It is all gas in the reservoir, but you can leave trapped behind gas in the reservoir that would be gas at the surface. So, it is not as critical in a gas reservoir as in an oil reservoir. We have recovered better than twenty-percent of our gas reserves [fol. 181] in the gas fields that have been completed today, but it is an important measure to properly produce a gas reservoir.

[fol. 181] Q. Explain what is meant by an oil field that is gas—that has a gas drive, a solution drive or a water drive.

A. We classify—I mentioned a while ago that the determining factor in fixing the quantity of gas that is recovered from an—of oil that is recovered from an oil reservoir is the energy available. You stop producing when you run out of energy, not when you run out of oil, and so it is natural that you would classify oil reservoirs according to the energy source. Now, there are some oil reservoirs which have no gas cap, no water. They are just enclosed in a—sealed off on all sides, and the oil is under pressure, and it has gas dissolved in it, like carbondioxide in a coke. These are solution drive fields. The only source of energy is the gas that is in, dissolved in that oil. Those are the least efficient types of oil fields. Recoveries range around 15 to 18 per cent from a typical solution drive reservoir. Then, there are other reservoirs that are sealed off, but overlying the oil under pressure that has got gas in solution is a gas cap, free gas overlying the oil, and if you correctly produce such a reservoir, if you drill your wells through the free gas cap on down into the oil zone, it is sort of like, if anyone would understand the illustration here, a Seltzer bottle, where you have got, the glass tube goes down into the water, and you can recover most of the water out of the Seltzer bottle by that carbondioxide in the top of it pushing down [fol. 182] on the water, but if you put that tube just partly

in, why, you blow off all of your carbondioxide on top, and you don't get your water out. When your carbondioxide is gone, why, that is all you are going to get out of the Seltzer bottle. Well, now, that is what is known as a gas cap reservoir, and by preventing the dissipation of gas from the gas cap, and, if necessary, injecting additional outside gas into the gas cap, you can get much higher recoveries than from the solution drive reservoir. Recoveries range from, say, fifteen per cent up to thirty-five per cent, occasionally even up to fifty per cent, from a gas cap reservoir, and the final type of field is one which you have got vast quantities of water underlying the oil. You may or may not have an overlying gas cap. As you produce a barrel of oil, water moves in behind it and flushes that oil out of the rock. That is the most efficient type of reservoir. The East Texas Feld is one of the best examples of that type, and we are getting recoveries from the East Texas Field of a little above eighty per cent. So, there are the three types of reservoirs. The Scurry Field, an example in West Texas of the solution drive field, where we are going to get about one barrel out of several by primary methods, and the East Texas Field, an example of the water drive type, where we are getting four barrels out of five.

Q. Taking that Scurry Field, would there be any way to recover more of that oil by using what you might term secondary methods of recovery?

[fol. 183] A. Yes, I mentioned earlier that you stop getting the oil when you run out of energy, and, therefore, the think to do is artificially—is, one, conserve the energy; don't waste it; and, two, artificially increase energy sources. Well, now, in Scurry it is possible—this hasn't been done, so there is a little bit of conjecture, but I have reasonably carefully studied the reports, and I think very thorough laboratory and some field testing has been done, so, there is considerable basis for this opinion. It looks like if the plans to have a fluid injection program in Scurry go through that we may—that we will at least double recovery and may even triple recovery from the Scurry Field by injecting gas or water or probably both.

Q. Where would the Railroad Commission get that gas they are going to inject?

A. Well, it is a problem——

Mr. Looney: Just a moment. Did I understand he asked if the Railroad Commission would do the injecting? You didn't say that, did you?

Mr. Geppert: He said he would order it.

Mr. Looney: I am just trying to follow you. You said where was the Railroad Commission going to get the gas.

By Mr. Geppert:

Q. The Railroad Commission, in the conservation problem to recover that oil, do you think you have authority to order gas injected into it?

Mr. Culton: We object to that as being a matter of law.

The Court: The objection is overruled.

[fol. 184] By Mr. Geppert:

Q. Have you exercised that authority in the past?

A. Possibly I inadvertently used the term "we". You know, I get to thinking of being a part of the industry, and the industry could do these things, and that is what I referred to, the producers in the Scurry Field doing this, with orders, regulations from the Commission to assist in the project. Now, we have been quite—We have been reasonably well satisfied with the progress that the operators in Scurry are making today, and we haven't tried to coerce them into hurrying along with their injection program, but probably a factor in the rapidity with which developments are unfolding there is the knowledge that the Commission, if they were too slow in doing the thing that would be in the best interests of the public in the practice of conservation, the Railroad Commission would probably order it done, but—and that is why you may—I said "we" when I referred to the industry at large. Now, to answer all of these questions, the Commission has shut in the Fort Chadbourne Field because they were not practicing in our judgment sound conservation. The field is actually closed in. It isn't up for litigation. Therefore, I take it it is appropriate for me to mention it. There was a case where we shut the field in because they weren't practicing conservation, and told them to shut in, stay shut in until they came

in with a program of conservation. We are having a hearing tomorrow in which the operators are coming in and tell us how they are going to propose to increase recovery. Now—

Mr. Looney: I don't want to cross examine you at all, [fol. 185] but I didn't get whether you said that was an oil field or a gas field.

A. It is a gas field. Now, therefore, that is what we think we have the authority to do, and which we are doing wherever we find it necessary. We try to be as liberal as possible in waiting and encouraging operators, and I am speaking now as one commissioner, and I have heard indications from the other commissioners. We probably would do the same thing in the Scurry Field, if they moved too slowly or didn't move at all. We would order that field shut in until they started injecting gas or water. Now, the question comes up—you asked where would the Railroad Commission get the water or the gas. The Commission doesn't plan—We hope we won't have to order it done. Therefore, the problem is where will the operators get the water or gas, and that is a very real problem. They have tentative plants to get about three hundred million cubic feet of natural gas a day from, I believe from two interstate pipelines. There is no gas in the Scurry Field, so they are going to have to get the gas from outside sources for the injection, and there is a water district formed up there—I forget the name of it—A dam has been built and a reservoir being formed to supply the cities of Odessa and Big Spring and other cities, Snyder, with water, and the oil companies, have underwritten the cost of making, of almost doubling the capacity of that pipeline to bring water from this reservoir into the Scurry Field to have it for water injection purposes. Now, I wandered a bit there, but did [fol. 186] I clarify that?

Q. You did. I will ask you this question. If you thought it became necessary to order that gas put back into the reservoir in order to have a secondary recovery of oil, assuming that to be physical waste, underground waste, and the only gas available was gas that had been dedicated to pipelines to go out in interstate commerce, in your way of

thinking, would that alter your right to order that gas put back in the ground?

Mr. Looney: Your Honor, that clearly is a matter of law, as to what they could do under circumstances such as that. The Railroad Commission's views sometimes as to what the law is have been sometimes upheld, and sometimes they haven't been upheld. It is a question of law as to whether they could go in and break a contract or not. For that reason we object to it.

The Court: The objection is overruled.

A. I was about to ask—to answer as to our opinion, but there has been a case where we did do that. Now, it wasn't—I don't think the case was adjudicated. It didn't go to court, so I don't know that that proves anything about the law, but we did force the cessation of production of gas into a gas—interstate gas pipeline where the gas had been dedicated under Federal Power Commission proceedings. We required that to be stopped and that gas put back into the reservoir. But now to answer as to what we might do in Scurry, yes, we would—Here are the fact situations as we see them. The recovery can be doubled, probably tripled by the injection of that gas, and so—and you don't waste that [fol. 187] gas. It is there for later use, and so we think we would be serving the public and the interstate gas pipeline as well by requiring them to sell that gas for injection into the reservoir because it would greatly increase oil recovery. You will get more gas back than you put in. You see, you get some of the oil vaporized, and so the gas pipeline down the line will get more gas, can buy more gas back than they sell today, and possibly it isn't a completely clear legal picture, but I can say that we have considered it, and we would undertake to do that, and so far the courts seemingly, if we have sound enough reason and fact basis back of it, have sustained us. Seemingly where we have been out of line, it was not lacking power to accomplish conservation but just not being quite clear enough and sure enough of our facts on conservation. I am expressing an opinion I shouldn't there, but if nothing reduced our conviction that oil recovery could vastly be increased, maybe tripled and that you would get more gas back in the long run, we would undertake to require the interstate pipeline to sell them

that gas, because it is our fundamental conviction that the best and most valuable use for gas is to put it back in an oil reservoir where you can increase recovery by so doing, because you are not wasting the gas. You are saving it. It is going to be more in demand in future years than it is today. Fortunately, we haven't often had to fight that issue, and this is not a matter that the Commission has had official connection with, and therefore I may be in error in [fol. 188] speaking about it, but it is my understanding that these interstate pipelines that are proposing to sell gas to the Scurry Field for injection—

Mr. Culton: We object to the word "these", unless he points out and shows that one of the plaintiffs in this case is one of those.

The Court: The objection is sustained.

A. I don't know whether they are among the plaintiffs here or not. I believe that the El Paso Natural and Lone Star with some other pipelines were possibly involved, and I don't know whether they are plaintiffs here or not.

Mr. Geppert: They are not as to this proceeding. Go ahead.

A. I believe that—Am I permitted to continue to answer the question?

Mr. Culton: I think the Court sustained the objection unless it shows that one of these plaintiffs is what you are talking about.

Mr. Geppert: I thought you wanted to know which one he was talking about.

Mr. Culton: Well, my objection was that unless it was shown that one of these plaintiffs was one of the companies he was talking about.

Mr. Looney: Of course, we don't contend that there is any law or a violation of the constitution for an intrastate company such as Lone Star or an interstate company, such as El Paso Natural to sell intrastate as well as interstate, [fol. 189] if it wants to.

General Daniel: As I understand the objection and the Court's ruling, since he has identified the companies, it would be permissible.

The Court: Let him go ahead and explain the problem.

A. I can briefly answer. As I was going to say, the Commission hasn't had to coerce them, if it has the authority to do so, into supplying the gas. We have let them know that we would appreciate their doing that, but these companies apparently feel that that gas is going to be more valuable——

Mr. Culton: We object to what the companies feel, this witness testifying what the companies feel.

The Court: That is the difficulty we get into there. I sustain the objection.

By Mr. Geppert:

Q. Well, I will ask you this question. I would like for you to explain if it is a fact how the State of Texas, by virtue of the oil and gas conservation statutes and their enforcement by the Railroad Commission, has given any opportunities, if it has, and afforded any protection or conferred any benefits upon those who take or retain gasoline—gas at the outlet of a gasoline processing plant for transmission through pipelines? Has the State of Texas conferred any benefits or privileges to those people by virtue of its conservation laws?

A. Yes, I think every material benefits.

Q. Will you explain in detail what those benefits are?

A. Well, partially my explanation would involve repetition of my statement earlier, that an interstate or intrastate pipeline must spend a tremendous amount of money in laying these facilities, and, therefore, they have got to have assurance of long life reserves, and by preventing waste of gas, by increasing recovery of gas, we have given them the assurance of these long life reserves, which have made it possible for them to build the lines and for them to reap great profits from it. I could illustrate, back years ago when we were flaring so much gas from the Panhandle, you remember I mentioned at one time we were flaring a billion feet of gas a day, and here gas was just going to waste, and cities back East were very desirous, much in need of natural gas, but you couldn't afford to build a pipeline from the Chicago area, for example, to the Panhandle, even though the gas was so cheap they were

just blowing it into the air instead of saving it. You could get your gas for nearly nothing, but you couldn't afford to build a pipeline down there because that field wasn't going to last long enough under the poor conservation practices to pay out the line, even though they could have been given the gas, and then when through legislation and Commission regulation that wastage of gas was stopped, and it became apparent then that the reserves of the Panhandle were going to be required to be wisely utilized, they could then see that they had reserves for many years. We will talk in the terms of 25 years, and so a great number of gas pipelines began to be built. I very keenly feel that conservation has made it possible, made it financially practical for [fol. 191] these intercontinental, transcontinental pipelines to come into business, and I trust I have made my answer clear in that phase. Now, after the day of stopping the flaring of gas, the Commission's regulation of casinghead gas, and our drive to stop the flaring of casinghead gas had gone hand in glove with the building of new interstate gas pipelines to come get this casinghead gas. I regret I don't have in mind the reserves of the state, but nearly fifty per cent, if I recall correctly, of the gas reserves of this state is casinghead gas. Excuse me. There is nearly fifty per cent as much casinghead gas reserves as there is natural gas reserves. Well, there, when you start using casinghead gas instead of just blowing it to the air, look how tremendously you have increased the potential reserves of gas in Texas which are available to supply these interstate pipelines, and the report of the Gas Conservation Engineering, on which I was privileged to serve, has been used in rather numerous Federal Power Commission hearings showing how much casinghead gas was being produced and flared down in Texas and how the Railroad Commission was planning to force the curtailment of that waste, and that therefore these reserves would be available for dedication to these pipelines, and I am told if it—

Mr. Culton: We object to anything he was told.

A. I withdraw that. I know—It is not hearsay. I know that that report was introduced into Federal Power Commission hearings as an argument that the line should be—

Mr. Culton: If the Court please, we object to what it was [fol. 192] in argument for. I think we are going pretty far afield when we say what it went into the Federal Power Commission——

A. Well, I can tell you what the Federal Power, two of the Federal——

Mr. Culton: Just a minute. I am making my objection.

A. Excuse me.

Mr. Culton: I have been in a few of those meetings myself, and the rules of evidence are given scant consideration.

The Court: Objection sustained.

A. Would it be appropriate to say what the members of the Federal Power Commission said?

Mr. Culton: They can come down and testify, if they want to.

A. But I couldn't repeat that fact.

The Court: Let's take a short recess.

(Thereupon, Court was recessed at 3:55 P.M. until 4:10 P. M., May 12, 1952, at which time the proceedings were resumed as follows:

By Mr. Geppert:

Q. Mr. Murray, I believe you stated that in your opinion, that in the absence of our state conservation laws and the enforcement by the Railroad Commission, that it would not have been economically feasible to have built a long line of pipeline to come in and get natural gas. I believe you stated that, didn't you?

A. Yes, sir.

Mr. Looney: Just a moment. Read that, please, Mr. Reporter.

[fol. 193] (Said question was read as shown above.)

Mr. Looney: Well, Your Honor, it is before the Court, so we will just pass it.

Mr. Daniel: What was your answer?

A. My answer was yes, that I had so stated, both that it was my opinion, and historical events demonstrate that it was true that they could not build them in the absence of those regulations, and the pipelines began to be built only after the regulations.

By Mr. Geppert:

Q. I will ask you to state in your opinion what would the effect be upon those that are now taking and retaining gas for transmission to the eastern and northern states, if the State of Texas repealed its conservation laws at this time or just failed to enforce them?

Mr. Loney: Your Honor, that is so speculative.

Mr. Geppert: If he knows, it isn't speculative.

Mr. Loney: You might as well ask him what would happen if we would destroy our atomic bomb or something like that. It is just wholly speculative. It is so speculative that it couldn't possibly, it seems to me, be brought in this as evidence. A man would have to be somebody that can look into a crystal ball and tell us what is going to happen in the future.

The Court: The objection is overruled.

Mr. Looney: Note our exception.

A. Well, I wouldn't consider it quite so speculative, be-
[fol. 194] cause we have the past to view.

Mr. Culton: We ask that that comment—It is supposed to be in reply to counsel's objection, and not the testimony of a witness.

A. Excuse me.

Mr. Culton: We ask that that comment be stricken.

A. I beg your pardon, sir. I recognize my error. The question—Could I have the question reread, please?

(Said question was read as shown above.)

A. If all of the oil and gas conservation laws were repealed or there was no enforcement of the laws, the effect on these pipelines, in my judgment, would be to cause great loss of investment. I don't think any of the recently built

pipelines which have not been paid out would ever be amortized, and there would be also a great suffering on the part of the consumers who are dependent upon these sources of supply of gas. While that is a very great concern to us, it may not be material here, and I base that opinion both on my predictions of what would happen and my recollection of what was happening before the laws were passed and the regulations enforced.

Q. Mr. Murray, it has been stipulated in this case in evidence that there is acreage in the West Panhandle and Hugoton Fields that has not been dedicated to anyone; there is some acreage there that has only been dedicated for short periods of time. In the absence of the Texas conservation statutes and the enforcement thereof by the Rail- [fol. 195] road Commission of Texas, do you know of anything that would prevent the producers of such undedicated acreage to drill as many wells as they saw fit and then flowing them at 100 percent open flow into either or both carbon black plants or gasoline plants?

A. Absent regulations, there would be nothing to prevent them.

Q. Would such action by the producers of such undedicated acreage result in the drainage of gas from the acreage that has been dedicated by contract by the Phillips Petroleum Company to place from those fields?

A. Very definitely. If you allowed unrestricted drilling and unrestricted production from leases offsetting these dedicated leases—I don't like—I cringe a little bit over the word "dedication", but for the purpose here, I will accept it there. The Commission here doesn't much like the idea of the thing—they can come down here and have to forever dedicate these reserves.

Mr. Culton: We object to one person talking about what the Commission thinks. If he has got an order that prohibits this so-called dedication, that is one thing, but I don't think that one member of the Commission has a right to testify as to what the Commission thinks about dedications.

Mr. Looney: He hasn't got a right to testify about what he thinks about it.

Mr. Coulton: Or even what he thinks about dedication. The fact is whether the law authorizes a dedication.

A. I could clearly demonstrate that my thinking is shared by my——

[fol. 196] Mr. Culton: Wait a minute. I am making an objection.

A. Excuse me.

The Court: I sustain the objection.

A. I should not have made my remark about dedication. If I could just have a little objection to using the word "dedication", I will go ahead and make no more remarks all the way through, but I as a member of the Commission——

Mr. Looney: The Court sustained the objection to the question.

A. Yes, sir. I won't use the word any more, but I don't want anybody else holding me to my testimony here as being that I recognized the principle of dedication. Is that a fair——

Mr. Loney: There is no question before you at the present time. The Court sustained the objection to the last question, so there is no question for you to answer right now.

General Daniel: No, he didn't object to the question, as I understand it, Your Honor. He objected to the answer, what the witness said.

The Court: That is right.

A. That was my understanding. He asked me a question about it, and then I made, I fear, an improper remark about dedication, but I did want to make it clear, and I will never mention it again, that I as an individual commissioner, even though I will answer in the future any question directed to me about dedication, dedicated acreage, still do not consider that a binding situation on the State of Texas, and wouldn't [fol. 197] like any of my testimony here to be later so construed. I won't mention it again. Now, to answer your question, if there were no regulations, it would be possible to drill as densely as an operator might desire and produce at open flow capacity wells from so-called undedicated acreage offsetting this dedicated acreage, and you could

quickly drain the gas reserves out from under the dedicated acreage. Does that clearly answer your question?

Q. It certainly does.

Mr. Looney: Your Honor, that is sophomoric. Anybody knows that.

Mr. Geppert: I wanted to get it in evidence. The Supreme Court of the United States——

Mr. Looney: It is completely sophomoric.

By Mr. Geppert:

Q. Would this action of unrestricted drilling to any density and wide open, would that have the effect of shortening the life of the Panhandle and Hugoton Fields to such an extent that the gas supplies that these plaintiffs are going to get here would be shortened?

Mr. Looney: Just a minute, Your Honor. That is purely speculative. It depends on how dense the people would drill their wells and how much they would take and what market there was for the gas, and it depends upon a lot of unknown factors, what would occur in the future. There is just so many unknown factors about the future, speculative, wholly speculative.

The Court: Do you want to restate the question?

By Mr. Geppert:

Q. Would this action of unrestricted drilling where the producer could drill all of the wells he wanted on his un-[fol. 198] dedicated acreage and produce them, not at 25 percent open flow but 100 percent open flow and flare the gas, after extracting the liquids, if he wanted to, making carbon black out of it, would that have the effect of shortening the life of the Panhandle and Hugoton Fields?

Mr. Looney: My objection is that that would depend on how the operators would operate in the future.

The Court: The objection is overruled.

A. Very definitely.

By Mr. Geppert:

Q. I will ask you to state what is known in the gas industry as a nomination.

A. A nomination is an estimate submitted by the purchaser of natural gas indicating the amount of gas that he desires to purchase for a month or series of months in the future. It is his prediction, the purchaser's prediction of the gas that he will need.

Q. Does the Railroad Commission allow both the producers and purchasers of gas to make nominations of their market demands?

Mr. Looney: Your Honor, there are bound to be some rules of the Railroad Commission on that. I know they are certainly the best evidence. If there are no rules, then there could be no—or orders, there could be no regulation of that, and if there be such, they are the best evidence of it. A great deal of this testimony that the witness is giving, in addition to that, Your Honor, is covered by the stipulation that we stipulated that the witnesses, if called, would testify [fol. 199] to thus and so, and in that respect it is repetition.

Mr. Geppert: Well, you cut that part of it out. You did stipulate to it, and you withdrew it.

Mr. Culton: No, we didn't withdraw anything. You were the ones that cut out 9, 10 and 10a.

Mr. Loney: Now, Your Honor, we don't want to require that they bring orders here where we can agree that the witness is testifying to what is contained in the Order, but we have a very great difference on this point as to what the Orders did or did not do, and now, therefore, we must object that the best evidence is the order.

The Court: Of course, if the inquiry is directed to specific provisions of a rule, the objection is good.

Mr. Looney: That is what it is.

The Court: The objection is overruled to the question, as he just inquired, in other words, if they allow nominations under their procedure. If he directs his inquiry to specific provisions of a rule, I will sustain the objection.

Mr. Geppert: Go ahead and answer the question.

A. I believe it was simply do we—maybe we had better have it read back.

(Said question was read as shown above.)

Mr. Culton: We object to that, unless we know whether we are talking about natural gas or residue gas or both. This witness has stated, and I think he is correct, that the nominations are by those who desire to buy natural gas, [fol. 200] and we have no objection to any inquiries as to how they take their nominations for natural gas. Natural gas is all the Commission has any jurisdiction over. The Commission doesn't have any jurisdiction over residue gas.

Mr. Geppert: I think that is a conclusion of Counsel.

Mr. Culton: Well, it is the law.

Mr. Geppert: Will you answer the question?

The Court: What kind of gas are you talking about? He wants to make his answer—

Mr. Geppert: I am talking about the gas that is produced in Texas in the Panhandle Field and in the Hugoton gas field.

Mr. Culton: I have no objection to that.

A. Excuse me. I go- to wondering here over his statement that we had no jurisdiction over residue gas.

Mr. Culton: Outside of measuring it and prohibiting its use for unlawful purposes.

A. Now, if the Court would forgive this partially evasive action, we are at present changing our procedure of requiring nominations or permitting nominations so as to have it more clearly understood who is to make the nominations, and we are proposing to require nominations on all gas, including residue gas, all gas that is handled. We are revising our forms, and if that is illegal, we are going to be—

Mr. Culton: We are objecting to any testimony as to what they might be planning to do.

A. Well, we have already got the order out. We are simply—

[fol. 201] Mr. Culton: We are talking about from September—the production from September through March past.

A. I am a little at loss, because I don't know whether or not our order was issued prior to—would it be March 1st or March 31st we are talking about?

Mr. Culton: Production during the month of March.

A. I think that our order was issued prior to—during the month of March.

Mr. Culton: Effective when?

A. Well, I will certainly have to agree the order would be the best evidence.

Mr. Culton: Yes, sir. I think that is correct.

By Mr. Geppert:

Q. Well, for the purpose of this question, we will limit it—we will ask you the question with reference to natural gas, making nominations. Do you confer that privilege upon the purchasers and producers of natural gas?

A. We have conferred the privilege upon purchasers and producers of natural gas to make nominations for a long time. For many years that has been a privilege that they have had, of nominating for the amount of gas they thought they wanted to purchase. Now, where I am confusing the issue is there has been some duplication. A producer would nominate and say, "I want to produce so much gas and sell it to a certain company," and the company would also nominate and say, "I want to buy it," and we are trying to eliminate that duplication, plus, in spite of counsel's statement that it is illegal, we are going to require that nominations be made for residue gas, or we had intended to, if [fol. 202] we don't get stricken down; so our reason for doing this, here, El Paso Natural, most of their take is from residue gas. Now, how are we going to know whether we are supplying El Paso's requirements, if they don't nominate for the residue gas they want? So, probably it isn't material here, and yet I didn't want to be inexact, and I have got to say to you that our whole procedure of nominations isn't changing in principle. It is simply undergoing a clarification so that there will be no duplication and there will be no exceptions, so that all of the gas that anybody wants to be bought, to buy, will be nominated for.

Q. Can a producer of gas or a producer of gas in a measure determine the amount of gas that they can get produced or supply their market with by making these nominations?

Mr. Culton: Read that question again. I want the witness to listen carefully to it.

(Said question was read as shown above.)

A. If it weren't for "in a measure", I would answer no, but in a measure, yes. I believe I could either clarify my answer or you might want to rephrase your question.

Q. Clarify your answer.

A. The producer by filing nominations doesn't necessarily or the purchaser doesn't necessarily determine the amount of gas he is going to get. I would like in the future to refer to the person filing the nomination as the purchaser, because that is the person that knows what gas he is going [fol. 203] to need. The producer's problem is simply to supply the purchaser with the gas the purchaser needs, so the purchaser by indicating the—by nominating for gas to a considerable degree determines the amount of gas that the Commission will allow to be produced by the producers.

Mr. Culton: All in the field?

A. Yes, sir.

Mr. Culton: Yes, not the one selling to the purchaser.

A. That is right, but now, that brings a point. Suppose here is a given field. Maybe just take the Carthage Field, and there are numerous inter and intrastate pipelines serving the Carthage Field. Now, suppose a certain interstate pipeline nominates for a certain quantity of gas. The nominations of all of the purchasers of gas from the Carthage Field will be added together and then distributed, and that certain interstate pipeline may get less than the gas they nominated for or may get more, but in order to have ratable take throughout the field we have got to put in the total demands of all of the purchasers into a pot, and then divide them among all of the producers, and if a purchaser doesn't happen to be connected to the proper number of wells to give him the amount of gas he wants, he must either exchange

gas with some other pipeline through interconnections, or he must take over connections or give up connections.

Mr. Culton: By taking over connections, you mean buying gas from somebody——

A. Somebody that he wasn't previously connected to. Now, if there is only one purchaser in a field, then the nomination [fol. 204] determines the amount of gas that is produced, but if there is more than one, the total nominations determine the total amount of gas, and it is up to them to see that they divide it in accordance with their needs among themselves.

By Mr. Geppert:

Q. In your opinion, Mr. Murray, does this privilege conferred upon takers of gas or the folks that are retaining gas for transmission in both interstate and intrastate commerce, to make nominations in order to measure the—meet their market demands, do you consider that a valuable right and privilege?

A. Oh, yes, very definitely, for the purchaser. The whole point of the nominations is to assure the purchasers of gas within the limits of ratable take, that they will get the gas that they need. As far as the producer is concerned and the Commission is concerned, we could just set a fixed amount of gas each month and allow them to produce that amount of gas each month, it would be a whole lot easier on the producer and a lot easier on the Commission, but it wouldn't assure the purchaser the gas he wants, and so we go to a tremendous amount of trouble and calculations in order to see that always the purchaser is getting the gas that he wants. Consequently, I do consider it a very valuable right and privilege, and if I might amplify my answer a while ago, the Legislature specifically for the benefit of the pipeline passed an over and under six months balancing provision, so that in the case I mentioned a while ago, where there was—say, the Carthage Field where there are several pipeline [fol. 205] lines, if a producer doesn't happen to have connections to sufficient wells to give him as much allowable as he needs during a particular month, he can overproduce. The Legislature said that is all right, and the Commission says

that is all right. It is kind of like an overdraft at the bank, and then the next month, if he underproduces and makes up his overdraft, and he can overdraw for a period of six months, and then have six months in which to make it up. Now, if in the period of a year's time you don't balance out, why, then, we begin to start cutting them off, and say, "Look, you just might as well get out and hustle you some more gas." Just like your banker will take care of your overdraft for a while, but not indefinitely, but that has gone a long ways toward solving the problem of the Commission requirement that ratable take exist between the producers, and affording these various pipelines serving a single field the ability to get gas whenever their particular customers demand it, and I do consider that a very valuable right and privilege to the gas companies.

Q. Mr. Murray, it has been placed in evidence by way of stipulation that has been read to the Court, that at the time the Panhandle Eastern, the plaintiff in this case, and Phillips Petroleum Company were negotiating relative to buying and selling the gas under certain acreage there in the Panhandle or the Hugoton Field, that was subsequently dedicated by Phillips Petroleum Company to plaintiff, that such parties estimated that gas would be available from [fol. 206] such reserves for approximately 20 years. At that time, under the law, the gas wells in that field were limited to 25 percent of their open flow. If the field would produce for 25 years—20 years at 25 percent open flow, how long approximately, if you could approximate, that the field would produce at total absence of any state conservation laws?

A. I couldn't approximate. I can say—my answer may be sophomoric, but it would be a much shorter period of time, if they are going to produce at much greater rates.

Q. In the absence of our state oil and gas conservation statutes and their enforcement by the Railroad Commission, in your opinion would it not—would it be or not be economically feasible for persons to engage in the occupation of taking or retaining of gas for transmission by pipeline or otherwise, where you had to go a considerable distance, as far as the northern and eastern states?

Mr. Culton: We object because the witness isn't shown qualified to answer. It is wholly immaterial anyhow.

Mr. Looney: And for the additional reason, Your Honor, that this is a tax, if valid, for the general upkeep of the state government, and not one, say, that the particular takers or receivers pay into the Railroad Commission a fund which would assist the Railroad Commission in administering the conservation laws. We have a similar statute to that. We have insurance companies taxed—they call it a tax. It goes to the Insurance Department for the administration of the regulatory laws. That is altogether a different situation, [fol. 207] Your Honor, than where the tax imposed, such as in this case, 9/20ths of one percent per thousand cubic feet, is for the general upkeep of the government. Now, I don't know what counsel is driving at. If he were defending a tax which was levied for the benefit of the Railroad Commission for the Railroad Commission to use to enforce the conservation laws of this State, that would be one thing, but that is not the kind of a tax that is before this Court. They have—the Railroad Commission itself has—There are taxes that are levied to go into the Gas Utilities Division to pay the expenses incurred by the Railroad Commission in connection with the Gas Utilities Division, and various and sundry departments have got that, and part of the oil tax, counsel suggests, but this is not that sort of a tax, and the courts throughout the time that they have had occasion to consider taxes have made a very clear-cut distinction between a levy for the purpose of policing or regulating a certain industry as against a revenue measure. Now, this is clearly a revenue measure. As the Attorney General pointed out this morning in his opening statement. I have forgotten how much he said, but he said some part of this thing, I think, went to the public schools, public free school fund, yes the public school fund. He said a fourth of it did.

General Daniel: All occupation taxes.

Mr. Looney: Well, you are talking about this, I take it?

General Daniel: Yes.

[fol. 208] Mr. Looney: This is called an occupation tax, if it is a tax at all, it is an occupation tax. It is described as being such, but, of course, perhaps I should reserve all of

this, since it is before the Court, until we get to the final argument in the case, but I can't let it pass without calling the Court's attention to the very clear difference between a levy for the purpose of serving some particular need of a particular industry or business, as against a general revenue measure.

The Court: Go ahead and answer the question. He has already answered it two or three times, I think.

A. May I have the question read, please?

(Said question was read as shown above.)

A. My answer, as previously indicated is that I do not consider it to be feasible for any major outlay of capital investment for lines of any considerable distance, unless we did have the conservation statutes and regulations in effect.

By Mr. Geppert:

Q. In the case of either gas well gas or oil well gas, after being produced, and it either goes through a separator and trap or meter, or it doesn't go through there; it doesn't make any difference; or it goes through a compressor station or doesn't go through a compressor station, and later goes through a processing plant where the liquid hydrocarbons are extracted from the gas, I will ask you to state at which place in your opinion could a person who was taking or retaining that gas for transmission through a pipeline could [fol. 209] first take it, whereby the person so taking it for transmission would receive the full benefit, the maximum benefit of the Texas oil and gas conservation statutes?

Mr. Culton: We object to that because it is confusing, only understandable——

Mr. Looney: Misunderstandable.

Mr. Culton: Misunderstandable, and it is a matter about which this witness has not been shown competent to testify.

The Court: The objection is overruled.

By Mr. Geppert:

Q. In the case of either gas well gas or casinghead gas that is processed at a plant for the extraction of gasoline or other liquid hydrocarbons, at which place could such gas

be first taken or retained by a person for transmission so that the person so taking or retaining for transmission would receive the maximum benefits of the enforcement of our state oil and gas conservation laws?

Mr. Culton: Now, we object to that question because this witness isn't shown qualified to say who gets the most benefit from our Texas gas conservation laws. If the witness purports to know who gets the greatest benefits from the Texas conservation laws, that is another thing, but he hasn't testified yet that he knows who gets the greatest benefit. I have understood from the orders issued by the Railroad Commission and from the statutes passed by the Legislature and the very wording of them is that it for two things, both of which are primarily in the interest of the producer of the gas: first, to prevent waste by some producer who negligently operates his property; and, second, to see that all of the producers get a square deal among themselves, so that each can get his part from the reservoir. Now, according to the statutes, and according to the rules of the Commission, as heretofore promulgated, and the orders that it has promulgated, those are cited as the very basis on which the statutes and rules are passed. Now, I don't know whether this witness purports to be able to say that somebody gets a greater benefit from the enforcement of the Commission's regulations than the producer or not, or whether he thinks that he is in a position to know more about it than the Legislature, and the majority of the Commission. My point is that this witness isn't shown as yet qualified to know who gets the greatest benefit out of the enforcement of the Commission's regulations.

The Court: Well, we will save some time and just sustain the objection to the question. Break it down and ask him three or four different things.

Mr. Geppert: I think I can clear up the objection he made by asking the question this way. The question was misleading.

Q. In the case of either gas well gas or casinghead gas that is processed in a plant for the extraction of gasoline or other liquid hydrocarbons, at which place could such gas be taken or retained by a person for transmission so that

the person so taking or retaining for transmission would receive the maximum benefit or whatever benefits he does [fol. 211] receive from the enforcement of our state oil and gas conservation statutes?

A. Shall I answer it?

Q. Yes, sir.

A. You are simply asking the point—

Q. Yes, sir.

A. Of maximum benefit, not for me to distinguish between the benefits one person or group receive against the other?

Q. Yes.

A. Well I would say obviously the maximum benefit would be at the outlet of the plant, because the plant itself operates under the Commission's conservation regulations, and benefits accrue from these regulations of the operation of the plant, and so my answer the point at which the maximum benefits occur would be after the gas has been finally processed through the plant, at the outlet of the plant.

Q. Where gas is produced and flows from the well head to a plant that separates the gasoline or other liquid hydrocarbons therefrom, where is the first place that gas could be taken or retained for transmission that such gas is in the best or proper condition to be transmitted by a pipeline for any considerable distance?

Mr. Culton: Just a minute. We object to that because of the generality. The pipelines operate in different ways. There are some pipelines that take sour gas out of Texas. There are some pipelines that take gas that has never been [fol. 212] through a gasoline plant, out of Texas, at fairly high pressures and sell it without it ever being processed, so I think that unless the witness gets information as to the character of operation, the question should be applied to, he would not be in very good position to answer it.

General Daniel: It is limited to gas going through a gasoline plant.

Mr. Geppert: Going through a gasoline plant, and asks about the best or proper condition.

Mr. Culton: What would be the best or proper condition is what I was talking about.

Mr. Geppert: I am talking about this particular gas that

did contain liquid hydrocarbons or gasoline and had gone through a gasoline plant, and has extracted those liquid hydrocarbons in the gas and then was taken or retained, at which point would it be taken and retained when the gas was in the best condition to be transported economically over any considerable distance.

Mr. Culton: Well, that phrase that counsel put in is what I was talking about, the best condition to be transported economically. That is a difference of opinion by different companies, depending on the way they operate.

The Court: The objection is overruled.

A. Well, now, I am assuming from your question by the fact that the gas is processed in a plant that it needs to be processed in a plant, and consequently gas which has sufficient liquid content that it requires processing isn't in suitable condition for long distance transportation until it has been processed, and therefore it obviously follows that the first time the gas is suitable for transmission, bearing in mind I am predicating it on it being wet gas to start with, is after it has been processed through a plant. Now, by further explanation that there are dry gas wells which do produce gas that is suitable in its condition as it comes from the well head to be transmitted through a pipeline, but you don't process that kind of gas in a gasoline plant; so when you told me that it was being processed, it obviously followed that it is only suitable for transmission after it has been processed.

Q. You said after it has been processed. Do you mean by that at the outlet of the gasoline plant?

A. Yes, sir, at the outlet of the gasoline plant.

Q. Take the witness.

Cross-examination.

Questions by Mr. Culton:

Q. Just a few points I wanted to inquire about, Mr. Murray. The first is, you referred to conditions prior to and subsequent to the time that the Commission's regulations became effective, as the construction of pipelines. Can you give us a date on that or tell us what regulations you are talking about?

A. Well, there has been a gradual evolution of the Commission regulations, and I intended to distinguish. There is no one date in my mind when it all happened, such as that. [fol. 214] Q. You said that a great many pipe line companies, though, had been constructed since the Commission regulations became effective. When did you start that construction period?

A. Well, the first phase I was thinking of was the days when we were wasting so much gas from gas wells in the Panhandle Field.

Q. That was 1932 to 1935—1934, was it not?

A. Thereabouts, yes, sir.

Q. How many pipe lines have been constructed into the Panhandle Field since that period?

A. I don't have the dates of those lines.

Q. Can you name one of them?

A. I can't name one that—you may have set dates. I unfortunately didn't check back, and I would have to think for a minute on some of the dates. I remember without—the occasion without remembering the year. Now, there was a period in the Panhandle when it did not—was not considered feasible to construct gas pipe lines, and I suspect that goes back earlier than '32.

Q. Were you out in the Panhandle at that time, back of '32?

A. I don't believe so. I think my days—

Q. Who are you talking about when you say they didn't consider it feasible to construct pipe lines?

A. Well, I must confess that part of this statement would have to be hearsay evidence. I can recall some publications, I can recall three articles in the Oil Weekly then by Denny Parker of the Railroad Commission.

[fol. 215] Q. That was during the period that they were stripping gas out there?

A. Yes, sir.

Q. '32 to '35?

A. Yes, sir.

Q. You recall, do you not, that the Colorado Interstate Pipe Line to Denver was constructed in '28?

A. Yes, sir.

Q. You recall that the natural gas pipe line—

A. But they didn't—'28—excuse me.

Q. Natural gas pipe line to Chicago with the Texoma organization was started in '29 and completed in '31; do you recall that?

A. Yes, sir.

Q. Do you recall that the——

A. I recall that it was about those dates. I can't recall the dates.

Q. Do you recall that the Northern Natural line was started in 1930 and completed to Des Moines in about 1932?

A. I would assume those dates are right.

Q. Do you recall that in 1935—in 1930 and '31 the Panhandle Eastern line was under construction first to the Indiana-Illinois line?

A. I don't recall, no, sir.

Q. Do you recall that in 1935 when Panhandle's markets increased it extended its system from the Indiana line to the City of Detroit?

[fol. 216] A. I presume that is correct.

Q. Do you recall that about 1927 the Cities Service line was constructed from the Panhandle to Kansas City?

A. No, sir.

Q. Do you recall that along about 1926 to 1928 the United Gas Pipe Line Company's line and the Lone Star line were constructed out of the East Panhandle Field?

A. I don't recall that.

Q. You recall, do you not, that principal reason for the popping of gas into the air after taking out the liquefiable hydrocarbons during the period of 1932 to 1935 was a lack of market for the residue gas, because the pipe lines had not then built up their markets at the other end of the line enough to take the capacity of their lines?

A. Yes.

Q. And if those people who popped the gas into the air had been able to get a reasonable price for the residue gas, you don't think they would have popped it into the air, do you?

A. If there had been regulation which would have——

Q. Just read the question.

A. I am clear on the question.

Q. Can't you answer it?

A. Not unless I can qualify it.

Q. My question is if they could have obtained a reasonable price for that gas that was popped by them into the air, you don't think they would have popped it into the air, do you?

[fol. 217] A. If they could have obtained a market for all of the gas which they were producing. The qualification I need to make is that they sometimes figured how it was a very wasteful thing to do, but they could make more by producing vast quantities of gas and saving the natural gasoline out of it and blowing the rest to the air or selling it for carbon black than to produce a restricted amount such as might be consumed by the market.

Q. There were very few producers of that type, though, weren't there? Most producers, in your judgment, if they could have sold their residue gas for a reasonable price, the same price that others were selling gas who had markets for it, you don't think they would have popped it into the air?

A. I certainly don't want to evade your question. Here is the qualification I am trying to present. For example, in the East Texas Field—

Q. I am talking about the Panhandle. You know these lawsuits, all three of them involve the Panhandle Field or the Hugoton Field, and let's stay with conditions up there. You referred to the conditions that existed in the Panhandle Field, and that is the conditions I am inquiring about.

A. Well, I can illustrate the qualification I need to make on the present—

Q. Can't you answer the question?

A. If—

Q. Just a minute. Mr. Reporter, will you read the question?

(Said question was read as shown above.)

[fol. 218] Q. If you can, answer it yes or no, please.

A. Do I have to answer it yes or no?

Q. Can you answer it yes or no?

A. No. I understand it clearly, if I could give a little qualification.

Q. All right. My next question is this. Do you think that a person would drill a well on proven gas acreage in the

Panhandle or Hugoton Field, costing \$20 to \$30,000 per well, and produce gas from that well, without first determining whether or not he could sell that gas or economically extract the liquefiable hydrocarbons and pop the residue into the air? It is all a question of economics with them, isn't it?

A. Your question is whether or not a producer would drill a well without first determining that he could economically sell the gas?

Q. Yes.

A. I say yes, in many cases they did drill wells without having any idea what they were going to do with it.

Q. It was with the expectation of selling the gas?

A. A great many wells were drilled without any expectation of finding gas. You drill for oil, and when you hit gas, you are disappointed, but it was a little bit—

Q. That was 1926 to 1927, up to 1930. The gas field of the Panhandle Field has been pretty well defined ever since the middle 30's, hasn't it?

A. Yes, sir.

[fol. 219] Q. And the gas field in the Hugoton Field has been well defined, has it not, during that period?

A. Not during that period, no, sir.

Q. It was well defined as early as 1940, wasn't it? Of course, there is—

A. I don't think so.

Q. In general—

A. I thought there had been some substantial definition of the Hugoton Field since 1940.

Q. It has been more closely defined?

A. Yes, sir.

Q. But there was a general understanding as to its general location?

A. Now, your question is specifically as to the Panhandle Field alone?

Q. And Hugoton. Both fields are in here.

A. I see. I am not allowed to discuss anything general.

Q. Just answer my question.

A. But we are talking about the Panhandle and the Hugoton only?

Q. That is right.

A. After—well, if I qualify, you may object. I will have to have him read it to see if I can answer yes or no.

Q. I will withdraw the question and make it this way. The Hugoton Field, the general outlines of it, have been fairly well-known in the industry and by yourself since at least 1940 or '41, haven't they?

[fol. 220] A. A good portion of it, yes, sir.

Q. Do you know of a single foot of gas that was ever popped into the air in the Texas portion of the Hugoton Field?

A. Oh, yes.

Q. Where? Whose wells?

A. Everybody's wells.

Q. Whose wells in the Hugoton Field?

A. There isn't a well in the Hugoton Field that hasn't popped a single cubic foot of gas.

Q. Oh, you are talking about on testing, aren't you?

A. I am talking about—

Q. On bringing it in. I am talking about after having the liquefiable hydrocarbons extracted.

A. What I presume you mean, was it deliberately popped to the air?

Q. Yes, after having the liquefiable hydrocarbons extracted.

A. No, sir, I don't know of it, but a single cubic foot, you mean substantial quantities that were not necessary to top. Excuse me, I don't mean to be telling you what you asked.

Q. There is a difference of opinion as to how much gas you ought to put into the air when you test a well?

A. That is right.

Q. Or when you bring in a well?

A. That is right.

Q. I am not talking about that. I'm talking about where somebody who didn't have a market for his gas took the liquefiable hydrocarbons out and popped the residue into [fol. 221] the air. You don't know of that happening any place in the Hugoton Field?

A. No, sir, not a single case in the Hugoton Field that I know of.

Q. And no pipe lines were built into the Hugoton Field in Texas taking gas therefrom until after 1942, were they?

A. No pipe lines built until after '42?

Q. Until after '42, in the Texas portion of the Hugoton Field, taking gas out of that field until after 1942?

A. I am just sorry. I don't remember the dates, and I will accept that.

Q. You don't know of a single contract for the purchase of gas out of the Hugoton Field in Texas prior to the contract entered into between Panhandle and Phillips Petroleum Company, do you?

A. No, I have no knowledge.

Q. And up to that time—

A. I don't mean that I agree that there weren't any. I just don't know.

Q. As far as you know, that was the first one, and you don't know that any gas was ever popped into the air in the way we have been talking about popping, from the Hugoton Field during the time they were waiting for pipe line connections?

A. I don't know of any, and I have—if this is voluntary, it might be fair, I have reasonably certain knowledge that there was not any substantial quantities continuously popped to the air deliberately just to get the liquids out of it, as there had been earlier in the Panhandle Field.

[fol. 222] Q. Yes. Now, the Hugoton Field gas is not distillate gas, is it?

A. It is relatively dry gas.

Q. My question is, distillate or retrograde?

A. No, it will not have appreciable retrograde condensation in the Hugoton gas.

Q. The fact of the matter, it won't have any, will it? The pressure isn't high enough?

A. Now, when you say not any and when you say a single cubic foot, and I am an engineer, that is hard. Would you be satisfied with me saying—

Q. You know the pressure of the gas in the Hugoton Field: you know the practical analysis of that gas, and you know the temperature of the gas. Now, knowing those things, don't you know that the principle of retrograde condensation would not work in that type of gas?

A. I know that there is no significant or appreciable retrograde condensation in the Hugoton Field.

Q. All right. The reason I was asking that is, you were referring to a place where liquids would drop out.

A. Yes, and I would definitely have knowledge that that has—

Q. The gas up there isn't the kind that you were talking about, is it?

A. No, sir.

Q. Nor is the gas in the Panhandle Field the gas you were talking about, then?

A. No, sir.

[fol. 223] Q. The word dry gas doesn't mean dry gas, as a person ordinarily understands it; by that you don't mean when you say dry gas that it is free from liquefiable hydrocarbons, do you?

A. Well, it is relative, sir.

Q. Is Your Honor ready for adjournment?

The Court: Yes, sir. We will recess until in the morning at 10:00 o'clock.

(Whereupon, Court was recessed until 10:00 A. M., May 13, 1952, at which time the proceedings were resumed as follows:)

Morning Session—May 13, 1952

WILLIAM MURRAY, JR., having resumed the witness stand, testified further as follows:

Cross-examination—(Continued).

Questions by Mr. Culton:

Q. Just a few questions this morning, Mr. Murray. You gave a definition yesterday, and I am wondering if you really meant that definition as it reads. You were asked, "What is known by the term proration?" The answer is: "Proration is restriction of the production rate from an oil or gas well to less than the physical capacity of that oil or gas well to produce." That isn't proration in your understanding, is it?

A. It is not a very clear definition, and I want to apologize to you and the Court for my lack of clarity. Yesterday I came here from the doctor's office. I was still running [fol. 224] fever and under the influence of a lot of these new drugs they are giving me, and I was just not thinking very clearly.

Q. Proration is merely the allocation among the wells which are entitled to produce of the total volume all of them are entitled to produce?

A. But it does involve restriction to less than the physical capacity to produce.

Q. Yes.

A. You see, in the old days, we—excuse me. Strike “we”. In the old days wells were allowed to produce at capacity, and there was no proration.

Q. Can you tell us how far back that capacity went?

A. Well, the advent of real proration was with—

Q. We are talking now about the Panhandle Field. How long has it been since a person could produce a gas well at capacity in the Panhandle Field?

A. He could produce his gas well at 25% of the calculated open-flow potential until relatively recently. That was—

Q. Your answer is backwards. I guess I didn't make myself clear. You say that in old days a person could produce the entire capacity of the well. By that you meant you could open it to the atmosphere and produce all that the well would produce?

A. I was talking generally.

Q. Well, I'm talking about the Panhandle Field.

A. You would like me to restrict all of my answer to the [fol. 225] Panhandle Field?

Q. That is what we are talking about here, the Panhandle and Hugoton Fields.

A. That is another thing that I have been at fault. I thought that general expressions for the State, I thought this involved the whole States, and I didn't know it was limited to the Panhandle.

Q. A great deal of your testimony yesterday related to fields other than the Panhandle Field and other than the Hugoton Field?

A. That is right.

Q. Well, I will not go into that that related to those other fields. We recognize——

A. I was speaking of general principles, and I had understood this to be a case where we were looking at the entire State of Texas.

Q. There are only three plaintiffs here.

A. I see.

Q. Two of them operate in the Panhandle, and two of them in the Hugoton Field. That is, one of them operates in both fields. The word proration merely means a dividing-up pro rata of a certain quantity among those entitled to produce, and that results in a limitation of the production from each well?

A. That is right.

Q. And even below the 25% limitation?

A. That is right. We didn't have proration in the Panhandle Field in the sweet gas section until 1948.

[fol. 226] Q. Yes, sir.

A. That surprises a lot of people. There has been——

Q. Just answer the questions, and then if anything else wants to be brought out later, it can. There was introduced in evidence here yesterday an Order 10-526, dated December 19, 1938. Was that Order ever enforced?

A. Would it be permissible for you to tell me what that Order is, without me taking the time to read it?

Q. It is an Order dealing with proration of the sweet gas field in the Panhandle.

A. Well, is this the final Order that—oh, I was reading the wrong date on it. That was long before my period on the Commission.

Q. Yes.

A. And I would—I have not had personal knowledge.

Q. I wonder if you remember from your knowledge of the Commission's actions that there was an injunction suit issued against the Commission, what is known as Consolidated Oil Corporation against Thompson, the way it went to the Supreme Court, I believe.

A. I have knowledge of that in this fashion. When I came on the Commission in 1947 and we began to look into the matter of putting into effect proration for the sweet gas reservoir of the Panhandle Field, it then—I then had occasion to be—read and discuss this old Order of the Commis-

[fol. 227] sion and the injunction suit, and I did attend some of that Court proceedings where the new Order of the Commission was attacked in Federal Court on the ground that the old injunction still restrained the Commission from putting it into effect.

Q. That was in 1949?

A. Yes, sir. Now, I didn't have knowledge of this at the time it went into effect, but I did gain knowledge of it ten years or so later.

Q. Yes. Did you in gaining that knowledge get the information that that Order was rescinded after a Motion had been filed before the Three-Judge Court to cite the Commission for contempt?

A. Yes.

Q. And that Order is one of the group attached as Exhibit "M", which is Defendant's Exhibit I, I believe, Exhibit "M" to the stipulation, and the Order is one dated December 19, 1938. Is that your recollection, that that was the Order that was involved at that time?

A. I didn't read the Order, but it is my recollection, from superficial examination.

Q. I wonder if you would at an intermission telephone and find out if that Order was not rescinded pretty soon after it was issued, at an intermission?

A. Possibly we could have someone call while this is still going on. I will have a gentleman over here in a minute that I can ask to do that, I believe, if Captain Richards will do it.

[fol. 228] Q. You do know that that Order to which I have just referred was never enforced during the period you were on the Commission?

A. When I came on the Commission in 1947, I found that the Order was not being enforced.

Q. Yes.

A. I was told—

Q. That is what I was getting at.

A. I was told it had never been enforced since the injunction came out. I am trying to be a little more careful today than yesterday by distinguishing between hearsay evidence and what I have personal knowledge of.

Q. What I am getting at, since you have been on the Commission, there was no effort to enforce the 1938 Order?

A. No, we put out a new Order which was somewhat similar.

Q. That Order was one which was put out in 1948, was it not?

A. Yes, sir.

Q. Prior to 1948, do you know that the Panhandle Eastern Pipe Line Company had not only constructed its original line, but had also substantially increased the capacity of its line out of the Panhandle Field?

A. Yes.

Q. And prior to that time you also know, do you not, that the Panhandle Eastern had entered into a contract with Phillips Petroleum Company for the delivery of 50 million feet of gas at Sneed, and gas from 175,000 acres in the [fol. 229] Hugoton Field; you know that all happened before 1948?

A. I have been told that, sir, and I have no reason not to believe it.

Q. You know from your experience on the Commission that Panhandle was getting substantial volumes of that gas?

A. Yes, sir, I have never seen the contract, and I have no direct knowledge, but I have always understood it to exist.

Q. Yes, sir, and that they were getting that gas prior to 1948 when the Commission entered the Order to which you have just referred?

A. Yes, sir.

Q. Now, it is also a fact, is it not, that prior to 1948 the Commission had no proration regulations applicable in the Texas portion of the Hugoton Field?

A. I believe that is correct. I did not refresh my memory on dates. I am regretful about that. I had the impression that I was to testify as to general matters of the State, and that—I think I am quite clear in general principles, but I can't positively state dates.

Q. As far as you recall, you don't recall any proration Order in the Hugoton Field prior to June 28, 1948?

A. The Order was issued since I came on the Commission.

Q. And you didn't come on until 1947?

A. 1947, so I am certain—

Q. That ties the matter in. Thank you, sir. Yesterday [fol. 230] there was some discussion about the extraction of liquefiable hydrocarbons from natural gas. In my questions, I am going to be talking about the natural gas which is produced in the Panhandle Field, and the natural gas which is produced in the Hugoton Field. From your knowledge of conditions there, for all practical purposes, the gas is of the same type, is it not, although differing very slightly in content, of different hydrocarbons?

A. That is correct, sir.

Q. And the gas is much leaner gas than natural gas which is found in some areas, is it not?

A. Yes, sir.

Q. That gas is found at depths ranging from 1800 to 3000 feet from the surface, roughly?

A. I believe that is correct, yes, sir.

Q. And the pressure is abnormally low in both fields, the virgin pressure, you, as a Petroleum Engineer, recognize it is abnormally low for gas found at that depth?

A. It is lower than pressure in a gas reservoir along the Gulf Coast, but it is about normal for pressures in that area at that depth.

Q. Well, those are the only two fields that have that gas at that depth, are they not?

A. All of West Texas is abnormally low, and so if it is all abnormally low, then that low pressure must be normal for West Texas and the Panhandle.

[fol. 231] Q. Well, is any of it lower than 430 pounds anywhere else?

A. Yes.

Q. At what depths from the surface?

A. Comparable depths.

Q. I beg your pardon?

A. Comparable depths. I don't mean to quibble with details, but I think I can answer yes, we generally consider it abnormally low, but we expect pressures in that area to be abnormally low.

Q. The purpose of my interrogation is leading up to another Order which was offered in evidence yesterday, dated January 18, 1939, one of the series that was offered as a part of Group "M", being an Order, No. 20-550, general Order, classifying wells producing condensate in the

State of Texas. Now, you do not consider that any of the wells in either the Panhandle Field or the Hugoton Field fall within that classification, do you?

A. No, sir.

Mr. Looney: That's Defendant's Exhibit I.

Mr. Culton: That is a part of Defendants' Exhibit I.

Q. Wells of that character are ordinarily wells that, where the production is found at very substantial depths, where the pressure is very high, and the liquids fall out from a release of pressure rather than from putting pressure to the gas?

A. That is correct.

[fol. 232] Q. So, that Order doesn't relate to either field as far as—

A. No, sir.

Q. You know, do you not, that in most plants more of the liquid hydrocarbons are extracted than would be necessary for extraction for economical transportation by that particular transporter?

A. Yes, sir.

Q. That is because of the economic value of the gasoline which is contained in the gas?

A. That is correct.

Q. And but for the value of the gasoline, you wouldn't expect to have gasoline plants which extract as great a percentage of the liquid hydrocarbons as are now extracted?

A. That is correct.

Q. They could have cheaper plants just to knock out the heavier ends, the hexanes and heavier, and the rest of it would be suitable for ordinary transportation at high pressures?

A. That is correct, which is referred to as LPG, liquefied petroleum gas.

Q. Yes.

A. Can generally be left in the stream and no great difficulty is occasioned from transporting it. Those constituents are more valuable to be extracted and liquefied and sold as bottled gas than to be sold as gaseous gas.

Q. And it is a fact, is it not, that in many instances up there the condition of the market for those LPG's is a de-

[fol. 233] termining factor in how much of the liquids the gasoline plants will extract?

A. That is correct, and—

Q. In other words, if the LPG's have a high value, they will be taken out; if they have a low value, they may be left in the gas stream and sold as a part of the residue gas?

A. That is correct, sir. Sometimes during the Winter months, when there is quite a demand for LPG's, they will recover it, and during the Summer months, they will just put it back into the general gas stream.

Q. In other words, they will take out some of those, when it is economical for them to do so, and then later when it is more economical to use it to sell it as gas, they will just sell it as gas, so it all gets into the economics of the project, and there are no regulations of the Commission as to how much, if any of the LPG's are taken out of the gas before it goes into the pipe line?

A. No, sir.

Q. There is a regulation, I believe, as to taking LPG's out of gas before it is used for carbon black?

A. Yes, statute, I believe.

Q. Yes. Now, do you know that as a matter of fact for a long period of time Cities Service Gas Company transported all of its gas which it produced in Texas out of the State and on to other markets without taking any of the liquids out?

A. I didn't know that, but I would consider it feasible. I [fol. 234] would accept that statement that they did, but even had I not been told that, I would consider, from my knowledge of the Panhandle gas, that it would probably be feasible, possibly with the installation of line drips.

Q. To not take those liquids out?

A. Yes.

Q. And that is not an unusual situation in Texas?

A. To take gas directly from a gas well, passing it through a separator or a line drip and have it feed directly into a pipe line is not an unusual condition.

Q. You may not know, since you didn't come on the Commission until 1947, but did you know that for many years Panhandle Eastern extracted no gasoline from any of the gas which it transported out of Texas before it got to Liberal, Kansas?

A. I didn't know that, but I would consider your——

Q. Are you familiar with the fact that the Natural Gas Pipe Line Company now, as to a portion of the gas it transports to the Chicago markets, namely, the gas it gets from Sinclair, doesn't take any of the liquids out, but Sinclair merely runs it through a separator at the wells, knocking out the heaviest hydrocarbons? Are you familiar with that?

A. I am not familiar, no, sir.

Q. But all of these things dealing with the extraction of liquid hydrocarbons gets to the economics of the picture, both as to the person who sells the gas and the person who purchases it?

A. Yes.

[fol. 235] Q. Very largely a matter of economics?

A. Yes, sir.

Q. There was some reference yesterday to nominations, and I recognize the fact that you were feeling a little bad yesterday afternoon, and I just want to ask you a few summarizing questions. The question of nominations is merely a method by which the Commission obtains an estimate of the total volumes of gas that would be required for all purposes out of the field?

A. That is correct, and I picked up this morning——

Q. For oil, you—I don't know whether you still do—you used to get estimates of the Department of Interior, I believe, but you get the information any way you can, so as to exercise your best judgment as to how much gas people will require out of a particular field for all purposes?

A. As to the latter part, yes. The first part, the Bureau of Mines sends its estimate of market demand on oil.

Q. Yes.

A. We take nominations for purchases of crude oil just as we do for gas. At our Statewide hearing each month, we read out the total nominations from all purchasers of crude oil and the total nominations from all purchasers of gas, and I picked up this morning a nomination form for gas. I regret I didn't have it for reference when you were questioning me yesterday.

Q. Is that the one that has been in force for sometime, or a new one?

[fol. 236] A. It was put into force on 8-15-51, and it is still in effect.

Q. That says gas well gas, does it not?

A. No, sir. Would you like me to read—

Q. Is that the one that is used in Panhandle and Hugoton?

A. Yes, sir.

Q. Don't you have one that is used up there that says gas well gas?

A. We have another form for gas well gas. It is not a nomination form, but I think I have in here what you are referring to.

Q. The one I am referring to is white.

A. Here is a forecast for the production and disposition of gas well gas in prorated gas fields in the State of Texas. Now, that refers only to gas well gas.

Q. Don't you have one that is specifically for use in the Hugoton Field?

A. I imagine we do.

Q. You don't have a copy of that with you?

A. But now this is used by the West Panhandle, because on the notes here it says, "File two copies in the Pampa Office."

Q. Yes, but I had reference to the Hugoton Field. You don't know whether they have a special one there?

A. I will bring, if we could pass for the moment, I will bring over the man in charge of our Gas Department, and have him bring all of the forms, and he will be available to either clarify my understanding or testify himself as to any of these forms.

Q. Well, we can probably clarify the situation with a few [fol. 237] questions. All of this is done for the purpose of obtaining an estimate of how much gas will be used for all purposes out of the field?

A. Yes, sir.

Q. When that estimate is made, the person making the nomination may or may not get the amount he is nominating, depending on his own private contracts; that is correct, isn't it?

A. That is correct. Could I briefly give you the actual figures for the month of April?

Q. It is not important. If they want to show it later, that's all right. I want to get to just exactly what it is for.

Now, you make your estimate of the amount that will go for general pipe line use, both within and without the State, don't you?

A. We don't make the estimate.

Q. After you get the nominations, don't you form your own judgment?

A. I believe I could answer you quickly by just giving you the figures and telling you how it is done.

Q. I think you can answer. If my assumptions are wrong, just say I am wrong, and we will go ahead to the next question, but you also—

A. Would it be permissible for me, without giving the figures, to tell you what we do?

Q. I am asking the questions.

A. All right, sir.

Q. You obtain estimates as to the amount of gas required for carbon black manufacture, don't you?

[fol. 238] A. We request nominations for all uses of gas, even for the producer to use on his lease.

Q. That is what I am getting at.

A. And for casinghead gas.

Q. Now, you request nominations for pipe line gas; you request nominations for carbon black gas; you request nominations for lease use gas?

A. Yes, sir.

Q. If any gas is required for primary, for secondary recovery, you request nominations for that?

A. That is right.

Q. You request nominations for the total amount of natural gas, representing both the gas that goes into the pipe lines and gas which is lost in shrinkage in gasoline plants, don't you? That is taken into account, isn't it?

A. Yes, sir.

Q. And it is—

A. Now, I would have to—that is not an exact answer. I would have to tell you how it is taken into account, but it is approximate.

Q. It is taken into account, anyway. So that from all of these sources, you arrive at a figure, whether it is adding up nominations or an estimate or what, a figure is arrived at which represents the total volume of gas which you expect

to take, have taken out of that field for all purposes; that is one step, isn't it? And that is the general demand from the field?

[fol. 239] A. I can say approximately correct. I could so much quicker tell you how we do it accurately.

Q. I know, but——

A. You don't want it accurately, I guess.

Q. Well, now——

A. Excuse me. I was just trying to answer your questions, but you are not framing your questions——

Q. When I get through, you can make all of the speech you want to, but——

A. I don't mean a speech. I just want to be accurate.

Q. I understand, and I want to see just what these nominations reflect. Now, after you arrive—do you ever determine how much you expect to be taken out of the field, or how much the market demand for the field is in any way?

A. Yes.

Q. All right. After doing that, you divide that total volume among the wells producing gas in the field in accordance with your allocation formula, don't you?

A. Correct.

Q. And then it is up to each fellow to make his own deal selling his gas to pipe lines, to carbon black, or for any other purpose?

A. That is correct.

Q. Now, you, of course, are aware that the gas which is used for carbon black manufacture is exempt from the Gathering Tax Law? You have read the Gathering Tax Law?

[fol. 240] A. I have read it, yes, sir.

Q. You are familiar with that fact?

A. I wouldn't be able to say I was familiar with it. I don't pay any tax, and I just made a general reading of it.

Q. Well, from that general reading, you also found, did you not, that field use gas is exempt from the tax?

A. Yes.

Q. And you also found, did you not, that gas used for secondary recovery——

A. Yes.

Q. Is free from the tax?

12—198-201

Mr. Woodfin: If the Court please, I wasn't here yesterday, and I don't know whether you have any rules about one Counsel on a side. I have a couple of questions I would like to ask, if that is permissible under the rules.

The Court: Go right ahead.

Cross-examination.

Questions by Mr. Woodfin:

Q. Commissioner, you have been talking, of course, about the West Panhandle Field and the Hugoton Field and the proration Orders that were put there in 1948. Isn't it a fact, looking at the State generally, that there are very few gas fields where the Commission has entered any proration Order as such other than the 25% statutory open-flow limitation?

A. Well, you would have to define "very few." I could start naming some, and under my definition of "very few", [fol. 241] I would say no, that there are a good number where we have proration.

Q. Pardon me, Commissioner, I don't mean to cut you off. I just want to see if we understand what we are talking about, and then you can answer the way you want to.

A. Let me say this. There are no large gas fields that I can think of which do not now have proration allocation in effect.

Q. Well, when you say proration allocation, you mean that you take a nomination, but other than the 25% open-flow potential, with the exception of this West Panhandle Field and the Carthage Field, is there any limitation on the production of gas in the fields outside of those fields where you have got more than one pipe line company going in there and buying the gas? Is there any real limitation other than the 25% limitation imposed by the statute, which the Commission now has in effect?

A. Yes, sir. The 25% limitation is not in effect in enough fields to be of significance.

Q. Now, that is the point I am getting down to, Commissioner. The pipe line companies don't take the gas at the 25% open-flow potential, do they?

A. They take the allowable that we permit them to produce.

Q. All right. Now, Commissioner, do you know what the allowable is, let's say, for the McAllen Field? Do you have proration Orders in that field?

A. I believe we do.

Q. Well, now, Commissioner——

A. I may be in error. I can——

[fol. 242] Q. Isn't it a fact that the allowable from that field every month is exactly what the pipe line company nominates?

A. No.

Q. Well, now, Commissioner, I would like for you to check that, because I think you will find that that will be true. Let me put it another way. Is there any restriction imposed, let's say, on that field so that the pipe line company doesn't get all that it wants by any Order of the Commission?

A. Could I tell you how we do it?

Q. Yes, sir.

A. I will do it briefly.

Q. You can just tell me.

A. We ask for nominations from the field, and we allow that nomination to be produced if historically it has been shown that the Companies actually needed that amount of gas for which they nominated, but we usually find that they nominate for more gas than they need, and so, if we are talking about the month of April, that is what—I didn't mean to make a speech. I just thought it was easier to give him the figures.

Q. That is all right.

A. I have here for the West Panhandle Field——

Q. Commissioner, I'm trying to stay out of—I want to get away from——

A. You want me to stay out of the Panhandle?

Q. I am trying to get you in a field where they just have one pipe line going into that field.

[fol. 243] A. All right.

Q. Because there are a great many new pipe lines built into this State.

A. All right. Our policy generally, there are some exceptions; if you want me to be specific, I would have to check with my office.

Q. I don't think that is necessary.

A. But our general policy is for, let's say for the month of May, to receive by the fifteenth of April nominations for all of the gas that is to be desired to be used from that field. Now, in your illustration, there is just one pipe line and no other use for gas, so one nomination is received. Now, we check back, we are talking about May. So, we check March, we can't yet check April. We don't know what they are going to do, and we find what that pipe line company nominated in March, and what they actually took in March, and let's say that they nominated for 10 million cubic feet of gas more than they actually took, so when we get ready to decide how much gas we are going to allow to be produced in May, we deduct from the May nomination the amount by which they were in error in March, and that is the amount that we distribute. Now, that—I answered awhile ago that we made an estimate of what is demanded. We don't make the estimate. We just go back and see how far the Companies missed it the previous month, and deduct that same amount this time.

Q. All right, now—

[fol. 244] A. And so we find by experience that that hits it pretty close on the head. Now, keep in mind, if we are in error, the Company has the privilege of over-producing its allowable for six months and then balancing-out.

Q. Now then, Commissioner, in effect what you have said is that the Company determines its allowable by its take from the field in that case?

A. Right.

Q. And unless you run up against the 25% open-flow potential regulation or limitation put in the statute, then the Company can take what it wants to, based on its previous take, but it in effect by its uniform taking of gas sets the field allowable that it takes from that field; is that right?

A. I think the 25% statutory limit applies only to the Panhandle Field and the Hugoton. I think the statute says that that 25% limitation applies only to reservoirs producing sweet and sour gas.

Q. Sweet and sour gas. All right.

A. And we only have two that are that way. So, I don't

know of any adjudication of that issue, but I don't believe that that applies anywhere else.

Q. All right, sir. Well, let's assume that that is true, but let's say that the 25% open-flow limitation is a good engineering practice as the top allowable that you should take from a field. Let's assume that the Legislature used its wisdom when it said that for sweet and sour fields, but, of [fol. 245] course, I think we need to go to the MER in each case on a gas well when we are producing it, but the truth of the matter is, Commissioner, that none of these people operating under their gas purchase contracts produce anything near like the gas that could be produced at the maximum efficient rate of flow from those gas wells in the great majority of instances; isn't that true?

A. You see, we haven't made MER determinations on a great many gas fields, and so I can't say that there has been a Commission finding of MER on a large number of our gas fields. Personally, I suspect that we are nearer the actual MER for gas fields than is generally recognized.

Mr. Culton: For the purpose of the record, you mean most efficient ratio?

A. The most efficient rate.

Mr. Culton: Rate, I mean.

A. I suspect—now, some people have taken the 25% potential as the total efficient rate. In my judgment as an engineer, that is vastly in excess of the total efficient rate.

By Mr. Woodfin:

Q. It would depend upon each well and each field as to what the MER was?

A. That is correct. Now, there are many fields—is it permissible for me to give my judgment as an engineer, since I don't have any Commission findings on it?

Q. Well, I think you have answered my question, Mr. Commissioner. If you have something further to say, I would be glad to hear it.

[fol. 246] A. Well, I was just going to say that your question—there are many fields which in my judgment could produce substantially greater quantities than the pipe lines

are currently taking from them. There are many other fields that are producing pretty close to what I think they ought to produce.

Q. Now, Commissioner, I think you stated yesterday, I have read a portion of your testimony, you stated at length with respect to the activities of the Commission in getting some benefit and some use out of all of this casinghead gas that has been flared. Now, of course, you have had a terrific problem to get that casinghead gas utilized, haven't you, Commissioner?

A. Surely have.

Q. And hasn't one real answer to the utilization of that casinghead gas been providing a market for it by these interstate pipe lines?

A. Yes.

Q. Now, Commissioner, you are familiar generally, I feel, with gas purchase contracts that the pipe line companies make with the producers. I don't want you to say that you are familiar with the contract made on the third day of May or anything like that, but you are familiar generally with the form of them, aren't you?

A. Yes.

Q. And isn't it true that in the majority of those contracts or practically all of those contracts, the seller dedicates that gas to the pipe line company, but he retains the right to re-[fol. 247] duce those liquids, including methane, as long as it doesn't reduce the BTU content below an agreed BTU figure; isn't that correct?

A. I believe that is generally true.

Q. And isn't that right to remove those liquids considered a very valuable right?

A. In the case of relatively rich gases.

Q. Yes.

A. Now, I am confused. I was asked to restrict myself to the Panhandle awhile ago. I am permitted now to talk generally?

Q. Yes, you surely are. I want to step out of the Panhandle.

A. Well, it is valuable in the Panhandle, and is vastly more valuable in other cases.

Q. And that depends in each case upon the amount of

liquids in the gas as to whether or not the producer exercises his right to remove those liquids prior to the time he gives them to the pipe line company, does he not?

A. That is correct.

Q. Commissioner, I think there is one further thing I would like to bring out here. It is fortunate that you are an engineer and not a lawyer and know something about these things. If the gas is lean enough, isn't it completely feasible, and not only feasible but practical and economical, to reinject LPG gas into the gas stream and transport it by means of a pipe line?

A. And later——

[fol. 248] Q. Extract it at the other end of the pipe line.

A. Yes. There are some limitations on that.

Q. There are, of course, limitations on how much the gas can carry, but it would be the most economical way you could conceive to take propane from Texas to the East if it had a long line, that here adequate quantities of propane could be put in, and at the plant at the other end to take the propane out as it went by, wouldn't it?

A. No, sir, it costs a great deal to extract—if you blend your LPG in with a stream of relatively dry gas, then it is going to cost—you are going to have at the other end of your line a lot of gas to process, and it would cost you quite a bit to process all of that gas in order to strip the LPG out. It is generally much more practical to try to transport that LPG by tank cars or some cases by products line. I do believe—now, this is an engineering theory. Up to now I have been telling you what is practical. I believe that it would be practical to batch LPG in natural gas pipe lines by the use of pigs ahead and behind the batch, and that could revolutionize——

Q. Commissioner, would you be surprised to know that very complete and elaborate engineering study shows that you could save probably three cents a gallon on propane as against the tank car rate by transporting it from South Texas to New York through the pipe lines, as a part of the carrier of the gas and build your plant to take it out there?

A. No, sir, I wouldn't be surprised, because you see, be-
[fol. 249] fore I came on the Commission, I was in the gas

business, and was doing a lot of work on that trying to develop some techniques.

Q. Getting back to what we were concerned about here, it depends in each case, as Mr. Culton asked you, on the economics of how much squeal the producer wants to take out of the pig before he finally has to deliver that gas, and he retains that right under his contract to do it, does he not?

A. That is correct.

Q. That is all.

Mr. Culton: There is one further thing that I overlooked.

Cross-examination—(Continued).

Questions by Mr. Culton:

Q. You referred to your functions, your primary function in the enforcement of these regulatory laws is the prevention of waste, conservation?

A. Yes.

Q. That is recited in most of the Orders you enter?

A. Yes, sir.

Q. Now, you gave your secondary function as to assure an adequate supply of oil or gas available to consumers within and without the State. You never do recite that, do you?

A. No, sir.

Q. Do you know of any such provision as that in any law defining your functions?

A. I presume that that is the whole purpose back of want-[fol. 250] ing to prevent waste?

Q. The consumers?

A. Yes, sir.

Q. You don't think that the Commissioners themselves and the State of Texas on its production tax are interested?

A. Yes, but I think the greatest concern is the consumer.

Q. But you never recite that in your Orders?

A. No, sir.

Q. And you don't know of any statute that sets that out?

A. No, sir, I thought I was answering simply my opinion, now. I don't mean to say that that necessarily is the opinion my colleagues would share. I have heard them express it, though, and I don't mean to say that I have selected the

right order of magnitude, but that was my opinion as to the relative importance of our functions.

Q. But you do know that that first function is set forth in the statute?

A. Yes, sir.

Q. And the third function, you said, was seeing that equity was preserved between producers. Now, that is set forth in the statute, too?

A. Yes, sir.

Q. And you recite that in your Orders?

A. Yes, sir.

Q. Ordinarily you recite that your Orders are issued in order to prevent waste and to adjust correlative rights, or [fol. 251] to prevent drainage as between different producers, something to that effect?

A. Yes, sir.

Q. That is all.

Cross-examination.

Questions by Mr. Looney:

Q. You recited yesterday, Mr. Murray, at considerable length the benefits that in your opinion accrued to the pipe line companies by reason of the conservation laws of Texas and the rules and regulations of the Railroad Commission?

A. Yes, sir.

Q. Now, isn't it a fact that the gas taken by the carbon black companies for carbon black purposes receives those same benefits?

A. To a lesser degree, but I would say it is a matter of degree.

Q. They do, maybe not the exact benefits, but they, according to your theory, they couldn't justify their expenditure of capital expenditure and their operations without your conservation laws and regulations and rules; is that right?

A. Not exactly. Would you like for me to elaborate?

Q. Maybe I can make it clearer. Let me make—

A. I'm clear. I'm just not making my answer clear.

Q. All right. Explain.

A. You see, a carbon black plant, particularly the channel black plants, you can build a large capacity plant at rela-

[fol. 252] tively low cost per million cubic feet handled, and so when you are producing gas rapidly and going to have a short life, that is a fertile field for carbon black plants to run in and grab the gas that otherwise would be flared, because their initial investment is relatively low. They don't have to have very many years to amortize. Now, if you are going to build a pipe line, particularly a transcontinental line, you have got to have a tremendously large capital investment per million cubic feet of gas handled.

Q. Now, let me interrupt right there, and maybe we can come down to a common point. What you are saying is that perhaps the transcontinental pipe line would have a larger investment which they might lose, but to the extent of the investment, the benefits would be the same, wouldn't they?

A. I said it was the extent of the degree. I say the carbon black plants get something like a few per cent of the benefits that the pipe lines do.

Q. That is based on the capital investment you are talking about?

A. Partially, and partially on the fact that a channel black plant won't last as long as a pipe line.

Q. Let me point more specifically. What you are saying is, isn't it, is that the people who take gas for carbon black manufacture, maybe to a lesser dollar volume extent, but they receive in principle the same benefits as you said yesterday the pipe line companies received by reason of the conservation laws and the enforcement thereof; isn't that right?

[fol. 253] A. I don't believe I could agree, sir.

Q. Do they benefit?

A. I said awhile ago to a degree, a lesser degree, but the more I think of it, the less convinced I am that they benefit at all. The fertile field for the carbon black plant is when we don't have conservation regulations, and they can run in and grab at a cheap price gas that is going to be produced in a hurry, and a pipe line can't afford to come in, because it is not going to last long enough, so actually I guess the carbon black plants don't benefit; they really suffer. Now, if we would put these conservation rules in effect and then say, "Don't let any pipe lines come in," the carbon black plants would benefit, but when we put conservation rules in,

if you have got good reserves, pipe lines are going to come in and attract the gas away from the carbon black plants, so, actually, the carbon black plants—I retract my earlier statement. I don't believe they benefit at all. They probably suffer by conservation regulations. I don't like to admit that.

Q. All right. Let's see about that. You said in answer to Mr. Culton's question that when you fix the take from the Panhandle Field or the Hugoton Field in West Texas, that you take into consideration the nominations made for carbon black purposes; is that right?

A. Yes.

Q. All right. Now, you do that for pipe line purposes, too, you say?

[fol. 254] A. Yes.

Q. And you do it for field operations, lease and field operations?

A. That's correct.

Q. And you do it for reinjections for secondary energy?

A. Yes.

Q. All right. Now, insofar as your nominations are concerned or the procedure with respect to nominations are concerned, then all of the four equally benefit from whatever benefit occurs from the nomination procedure?

A. No, sir.

Q. They don't?

A. No, sir.

Q. They don't?

A. No, sir. The carbon black plants do not. I retract my first statement. I thought to a slight degree, but as I have reflected on it, I would say the carbon black plants do not benefit from these procedures. An illustration, when we didn't have conservation regulations in effect in the Panhandle Field, that was the era of the building of the carbon black plants. But then we aren't building channel black plants any more, and we are building gas pipe lines.

Q. Wasn't that the era of the building of the pipe lines before you had your proration in effect?

A. That is right, they started the pipe lines?

Q. They were all built before—

A. But the pipe lines have continued to build. We have

[fol. 255] had a much greater era of pipe lines, if you will let me talk about the State rather than the Panhandle.

Q. I will be like Mr. Culton. Let's pull back to the Panhandle.

A. All right. The pipe lines have continued to enlarge. There have been a few additional ones built, and you haven't—you don't build any new channel black plants.

Q. All right. Now, haven't—

A. The channel black plants say conservation is about to put them out of the picture.

Q. Now, isn't it a fact that all of the interstate pipe line companies were in the Panhandle Field before 1948 and in the Hugoton Field?

A. Yes.

Q. All right.

A. Now, please—

Q. If you limit the take by your proration Orders, to any extent, you are by that same token, would be about to put them out of business, wouldn't you?

A. Please do not confuse that the effective date of our proration Order was the beginning of conservation in the Panhandle Field. We had long ago stopped the flaring of sweet gas in the Panhandle Field. The Commission had long earlier stopped the flaring of sweet gas in the Panhandle Field, and it is not the date of our allocation formula that I'm talking about.

Q. Well, wouldn't the stopping of flaring of gas in the Panhandle Field benefit the carbon black companies as well as the pipe line companies?

[fol. 256] A. No, sir. I guess I'm just not making myself clear. It would seem like it would, but when you stop the flaring of gas, and you say you are going to restrict the production of gas to the reasonable market demand, then the pipe line companies are assured of supply through the years, and they come in and attract the gas away from the channel black plants.

Mr. Culton: By paying a high price.

A. By paying a high price, yes, sir. Now, it is my dream that the day will come when we won't have a channel black plant operating in the State of Texas. It is a waste only

slightly better than flaring gas. I didn't accurately state that.

Q. The flaring of gas dissipates the gas reserves, doesn't it?

A. Yes.

Q. All right, that makes that much less, whatever is flared, that would make that much less available for pipe line companies and carbon black companies alike?

A. Yes, sir, that is right.

Q. All right, to that extent, then, they benefit to the same extent that the pipe line companies do.

A. Well, we are just going in a circle. They don't actually benefit. It would seem reasonable to say they would, but the very conservation that would make more gas available for the carbon black plants, enables the pipe lines, by paying a high price, to take it away from the carbon black plants, and pretty soon the carbon black plants are going, the channel black plants are going out of business. They are not [fol. 257] building any new ones. They are just waiting for the old ones to wear out.

Q. And the paying of a high price is a direct result of your interstate pipe lines having a market for this gas, isn't it?

A. Yes, sir.

Q. All right, that is all.

A. I hope I sufficiently emphasized my agreement with your question, that the interstate pipe lines have been of tremendous benefit in furnishing a market for casinghead gas which had previously been flared.

Cross Examination—(Continued).

Questions by Mr. Culton:

Q. That is true also as to natural gas, isn't it, that had previously been used for primarily carbon black or not used at all?

A. Well, the pipe lines have furnished a market for natural gas.

Q. Yes.

A. But if they didn't furnish the market, it didn't get flared, because the State statute says if you don't have a market for sweet gas, you leave it in the ground, but we

had to have oil and there is no way of producing oil without producing casinghead gas, and so unless somebody currently would offer a market for the casinghead gas, you had to flare it or quit producing oil. You could leave your gas well gas in the ground.

Q. The royalty owners and the producer wouldn't get any benefit?

A. Wouldn't get any benefit, but the public didn't suffer, like casinghead gas just going into the air.

[fol. 258] Q. Yes, and the State wouldn't get any production tax from it?

A. Right.

Q. So, the coming of the interstate pipe line companies into the State of Texas has assisted the Commission in putting into effect conservation measures that it probably might not have been able to put into effect or to enforce but for the market for that gas?

A. Yes.

Q. Now, you referred to the fact that some of the carbon black people complained that the conservation measures of the Commission are about to put them out of business. You meant the prices paid by the pipe line companies for gas are about to put them out of business, didn't you?

A. Well, that is what they complain about, but I think that—if they could stop to analyze it, that is what the basis of it is, why they are going out of business.

Q. So, the thing is still in a circle, isn't it, conservation Orders by the Commission, markets furnished by the pipe line companies, they are all inter-connected?

A. Yes, sir.

Q. Each kind of helps the other out a little bit?

A. Yes, sir.

Q. Now, the flaring of gas, of course, would affect the carbon black companies adversely, as would it affect all other utilizers of gas, in that it would shorten the life of the field?

A. Yes and no. It shortens the life of the field, but that is [fol. 259] where the carbon black plants can come in. When the gas is being flared, they don't have to offer much price to attract them.

Q. They can practically steal it then—

A. That is right.

Q. From the dollar standpoint, but yet when the pipe line companies come in, they can't—

A. When we say, "You will practice conservation, and this type of gas is not going to be wasted," then the pipe line companies say, "Well, we can afford to build an extension into that field. We have got something to tie to there. We can pay our line out," and so when they go in there, they offer—coming back to agreement with your statement, they offer a higher price for casinghead. Now, they can't except under certain conditions, they can't burn sweet natural gas in carbon black, but the pipe lines—

Q. I know, but there are conditions under which they can?

A. Yes, sir.

Q. And do?

A. Yes, sir.

Q. Today?

A. Yes, sir.

Q. In the Panhandle Field?

A. Yes, sir, but you remember that Order that—I guess I had better not—

Q. At any rate—

[fol. 260] A. They had quite a ruckus over the statute, and then nobody much took advantage over it. There is very little carbon black—sweet gas going for carbon black plants, even though it is now permitted in the Panhandle under that statute.

Q. But that is just because of the price situation?

A. Yes, sir.

Q. That is all.

Recross Examination.

Questions by Mr. Woodfin:

Q. Commissioner, one short thing here. It won't take very long. I want to put you in the position of a pipe line company for just a minute, and I want you to be my engineer. I am going to hire you, and you and I are going to build a line. I am a lawyer, and you are my engineer, and I say, "Commissioner, where can we buy some gas?" You say, "Well, I know of a good reserve down here in Goliad County, and nobody is in there now, and I think we can get all of that gas dedicated." Now, wouldn't that be about

the way we would start out, to get our gas reserves before we did anything else?

A. Yes, sir.

Q. And you and I would get sufficient gas reserves under contract dedicated to that pipe line to make it feasible for us to get the pipe line financed, wouldn't we?

A. Yes, sir.

Q. That would be our next move, to get enough gas there where we could walk up to the Metropolitan Insurance Com-[fol. 261] pany and say, "Here is 2 trillion feet of gas dedicated to us. Will you let us have "X" dollars of senior money? That would be our next move, wouldn't it?

A. Yes, sir.

Q. All right. Our next move——

A. I generally went to Equitable.

Q. Well, Equitable. We will spread our business around. Our next move would be to go down to the Federal Power Commission and apply for a certificate to sell that line, wouldn't it?

A. I have done all of this, but I have stayed intrastate.

Q. All right, I have hired you now. You are off the Commission.

A. Up until now you are talking about things I have done.

Q. No, I am hiring you as an engineer now.

A. Well, that has got to be hearsay, because I have never gone to the Federal Power Commission.

Q. You know, though, Commissioner, as a Railroad Commissioner of the State of Texas, you know the general powers of the Federal Power Commission and what is necessary to build an interstate line?

A. Yes.

Q. All right.

A. And I know that they sometimes assume that they have powers that we don't think they have.

Q. I think that is right, but let's don't try to try the Tidelands case now this morning. Let's just stay right on the ball here.

[fol. 262] General Daniel: This is the F. P. C. case.

By Mr. Woodfin:

Q. Now, Mr. Murray, the Federal Power Commission is vitally interested in the natural gas reserves that you have committed and dedicated to that line prior or before they will give you a certificate; isn't that correct?

A. Yes.

Q. And it is a matter of policy with the Federal Power Commission not to give anybody a certificate unless they have got an adequate supply to take every day the quantity for which they certificate for at least twenty years; isn't that correct?

A. That is my understanding, and I think I can say yes, but that is hearsay with me.

Q. All right.

A. Up to now I have done it, and so I know the answer to the question, but that is my understanding.

Q. Now, then, on that 2 trillion feet a day we build a pipe line of 250 million a day capacity; that will run for twenty years. 2 trillion of reserves. We build 250,000 MCF a day line capacity. It will run more than twenty years.

A. You are a little faster than I am on my arithmetic. I assume that is right.

Q. Well, we get our line built, and we have got our money, and we have sold stock to the general public, and all of a sudden one day you walk into my office and say, "My goodness, they have drilled an oil well on half of our reserves down there." I said, "Well, what are we going to do?" [fol. 263] And you said, "Well, you know what the Commission is going to do. They are going to shut-in that gas or shut it down, and they are going to produce that oil," and I ask you, "How long do you think it will take them?" and you say, "Well, there is just no way to know. It might take five years, and it might take ten years," and so we have spent \$150,000,000, and we have built that line all the way down into that gas reserve, and we get a fellow over there that gets an oil field on the rim of it. Now what is going to happen to my gas?

A. The Commission would invoke Rule 6-B, which limits a gas well to the volumetric equivalent of an oil well, which

is a severe curtailment from the amount of gas you normally would produce, so, we don't have the gas from that field that we counted on. Now, if I had been engineer, I would have investigated the reserves we were going to depend on and find out whether there was any oil in there, and then we would have tied-up additional reserves of associated gas.

Q. All right, now, Commissioner, let's take this situation. That field, there has been a well drilled on the rim of it, there has been a well drilled in the middle, and there has been another well drilled over here, and you have gone down there, and they have run tests on all of those wells, and all of them are producing gas, some of them with a pretty high percentage of liquids in them, and you tell me, "That looks all right to me. We will buy that reserve," and we buy it, and then we go up and spend eighteen months or two [fol. 264] years building a pipe line down there, and we go over here on this well on the rim of the reservoir and turn it on, and she starts making about 300 barrels a day of pipe line oil. Now, isn't that perfectly feasible and possible?

A. It is possible, but if you hired the right engineer and geologist, they wouldn't likely let you get into that situation, because—I might not have done it, but I should have investigated whether or not there was a gas well which encountered the water-gas contact. If you have got water and gas in contact, you know there is no oil in between, and I would have, on building a line, I would have been conservative and say, "Look. Here is a field that is just being developed, and we can't be sure that there is not oil in it, so let's don't let that be the reserves we build the line on. Let's tie that up for later down the line, because after they produce the oil, then that gas will be fine, but let's go down here and get a field where it has been drilled and the flank has been tested, and we know there is no oil there, and we can kick back on that gas for the immediate future.

Q. Well, Commissioner, the long and short of it is, if we had had a bad engineer in that case, we would have lost half of our reserves for a number of years, wouldn't we, in the hypothetical situation?

A. You would have lost probably more than half of what you had anticipated would be the rate at which you could

withdraw gas from your reserves. You don't lose any of your reserves.

[fol. 265] Q. They are still there, but it may be forty years before we can get them out; is that correct?

A. That is right.

Q. In the meantime, we default on the bonds, and the bondholders take over the pipe line company; is that correct?

A. Yes, sir, but, now, if you go to the Insurance Company I have been going to, they are going to ask you these same questions: "How sure are you you won't have oil on the flank?"

Q. Mr. Clark asked me to ask you what they asked Glen McCarthy when he borrowed that money?

A. I have a comment, but discretion would be that it is best for me not to make it.

Q. To get back to my series of questions to you a minute ago about how these things actually work, really and practically work every day. That pipe line company says, "We are going to take 'X' number of feet down there," and as long as they don't get above what you consider the MER, and as long as they take what they have been taking, do you let them take it in accordance with their contract that they have made with that producer and that they borrowed their money on, and that they got their certificate from the Federal Power Commission on, don't you?

A. I got a little bit lost. I think I can answer yes, but I am not for sure all that was involved.

Q. That is all you need to say. Read it back to him.

(Said question was read as shown above.)

[fol. 266] A. Are we back on the assumption that there is only one pipe line?

Q. That is correct.

A. Serving the field. I can say we have so far. We are considering changing that policy.

Q. And if you change that policy and reduce that amount of gas that that pipe line company can take, you have reduced their reserves, you have reduced what they can take; they have got to go build some more lines and buy some more gas somewhere else, haven't they?

A. That is correct.

Q. That is all.

Redirect Examination.

Questions by General Daniel:

Q. Did you mean they reduced their reserves?

A. I got in the bad habit of answering only the last part of it. I meant, it is correct he has to go buy his gas somewhere else in order to currently have enough available. It by no means reduces the reserves. It just spreads the life out.

Recross Examination.

Questions by Mr. Woodfin:

Q. You reduce the rate of the take of those reserves; the pipe line company can't just go back there and re-amortize its bonds or re-amortize its preferred stock on that \$150,000,000, can it, Mr. Murray? It isn't likely, is it?

A. No, sir. Of course, you are not likely going to be able—I wouldn't, to finance a thing if you have got all of [fol. 267] your eggs in one basket. I would have showed them how many trillion cubic feet of reserves there were in a 150 miles area and said, "If anything happens to the reserves I'm talking about, look at the millions and trillions of feet I have got within ten miles of my line, and it don't cost much to go lay a line to another one.

Q. Mr. Murray, have you taken a look recently at the competitive situation in purchasing gas in Texas in the area of any pipe line? Are you familiar with that situation?

A. Not nearly as intimately as I was when I was in the business. I know that it has changed vastly since I was in the business.

Q. You do realize and know it is far from being a situation where a man when he got a gas well had to go to his banker and say, "I don't know what we are going to do. I don't have any market. I have got to shut her down, and maybe somebody will come along here and give me three cents for it." You realize that situation has changed until the man with the gas now is really in the driver's seat, isn't he?

A. That is correct.

Q. And what brought that about, Commissioner?

A. Increased demand, intra and interstate.

Q. The greater portion of that increased demand has been by the long line interstate pipe lines, has it not, sir?

A. It would be in whatever proportion the actual take is. There is a great deal more gas used in Texas than is exported at this time.

[fol. 268] Q. That is certainly true.

A. But the big new development, the big recent increase in demand has been the interstate long pipe lines.

Q. But it is that competition in there to buy that gas by these long line companies that has driven that price up to where gas is worth now or will be in the near future more than an oil well; isn't that correct, sir?

A. Let's say it is where gas is worth a whole lot more than it was, and I can say yes.

Q. And if you have got any liquids in there at all, and if you have got a connection with a major line, a major long line pipe line, it is more valuable property than an oil field, isn't it?

A. Well, it all depends. I mean, there are some sorry oil wells, and some wonderful gas wells, and vice versa.

Q. That is correct.

A. It used to be there wasn't any gas well worth much. Now they are tremendously valuable in some cases.

Q. And by that very thing it has increased the value to the producer, to the royalty owner and to the State of Texas, hasn't it, Commissioner?

A. Yes, sir.

Q. And if we kept all of our gas in Texas, and if we kept all of our oil in Texas, we wouldn't have much to do with it, would we, Commissioner?

A. Amplify the question, please, sir.

Q. In other words, if we—every day I see where some—[fol. 269] body in Texas is complaining about bringing in Near-Eastern oil and that we have got to cut back the allowable on Texas oil, and then the next day I see where somebody is complaining about gas being shipped out of Texas, although it is not as much as they stopped flaring. My whole point is, if we keep everything in the ground, we get no value out of it at all, do we? We would be like

the King of Saudi Arabia, when the American Oil Company came over there and drilled those wells for him.

A. If you keep everything in the ground, you get no value out of it. Now, there is one school of thought that Texas has a tremendous industrial future, based on the synthesis of petroleum hydrocarbons. We can make all sorts of products from natural gas, and natural gas is the only fuel we have for Texas. Now, it has been prophesied that Texas will become one of the two most popular States in the Nation, Texas and California. Based upon the industries that will be built using Texas gas for fuel and raw material, there is a great future in store for the State, and if you export all of the gas out of the State, then you can't have it left to use for this industrial expansion down here. Now, that is a school of thought which is opposed to the export of gas. They don't want to leave it in the ground locked-up forever there. They just want to save it, and they say you will get—when you export it, you may get five or six cents per thousand at the wellhead for it, and when you use it down here, you may get \$2 or \$3.00 per thousand in terms of finished products and purchasing power and wages and taxes paid by these industries. [fol. 270] Q. Commissioner, isn't it actually true that there is actually less gas being exported from Texas now than they used to flare and got no benefit or no use for or from at all?

A. That is true, yes, sir.

Q. And the fellow that had that shut-in gas well down there, that argument about a big industry coming in down there and buying his shut-in gas didn't appeal to him when he was up at the bank trying to find some way to hold on to that lease, did it?

A. No, sir.

Q. That is all.

Recross examination.

Questions by Mr. Culton:

Q. Commissioner, that idea you are talking about holding that for the future isn't the idea of the people that own that gas, is it? That is the people that don't have any interest in the gas, isn't it?

A. That is right, generally.

Q. That is all.

A. Some companies are holding for the future.

A. For high prices?

A. Yes, sir, but the producer is generally a patriotic fellow, but he isn't altogether altruistic, and he likes his money today, and he is going to sell where he can get the greatest return from it, and while I frankly would have to admit that if I were planning the future of the State of [fol. 271] Texas, going to a dictator and plan the greatest future for the State of Texas, I would keep the gas in the State, but that is not the way our economic system works out, and if the out-of-state pipe lines will come in and pay a higher price for it than local, then I say let them have it, but I also say, and that is why I was partially quibbling, I fear, it may have impressed you yesterday, about this right of dedication. I think the Federal Power Commission has no right to fix the price of gas when a local industry would pay more for the gas.

Q. You are not going to get into any controversy with me over the statement.

Mr. Woodfin: I want to also be made clear on that.

Mr. Culton: I have made that statement publicly and privately and before the Power Commission and everywhere else for about ten years.

Mr. Woodfin: I think, Mr. Culton, we want to go a little further than the Commissioner's statement. Let's don't limit it to a situation where somebody is going to pay for it locally. Let's take it generally and say they have got no jurisdiction to fix the price of gas.

Recross examination.

Questions by Mr. Looney:

Q. I am wondering, Mr. Commissioner, the school of thought that wanted to keep it here and bring all of these industries here, are they people that prefer to live in places like New York and Brooklyn than to live in a wonderful place like Texas.

[fol. 272] A. I didn't get that question. Could you amplify it?

Q. Well, I am saying, if you industrialize, the people that want to keep all of this gas in Texas by bringing all of these industries here, do you think that they want to make another Brooklyn and another Pittsburgh and another Chicago out of Texas as we now have it?

A. Well, one of my colleagues on the Commission is among those who is a strong advocate of keeping the gas in the State. Now, he is a patriotic Texan, a businessman, and he looks at the greatest future of the State. I am an engineer, and I want that gas utilized. I don't want it wasted, and I am ready to turn it over to the businessman, the decision of where it is going. I have got enough problems just to say, "Let's quit flaring it," and any use is better than flaring it, and then there are other preferential uses. Gas ought not to supplement coal in the long range picture. It is absurd when we have thousands of years of supply of coal and about fifteen years reserve of the gas to continually have gas replace coal, but I am still a believer that the free laws of supply and demand and free—let the price work the thing out, is the best system for having the greatest good for the greatest number. That is kind of old-fashioned, but—

Q. And these interstate pipe line companies have contributed largely to the increase in the price of our natural gas in Texas, haven't they?

A. Yes.

[fol. 273] Q. That is all.

A. I am told now that the Order about which you questioned me, the proration Order for the West Panhandle Field, was never rescinded.

Mr. Culton: That is 1938?

A. Yes, sir that it was just left on the books, an injunction was in force against it, and then the new Order of '48 superseded it, and that the Court allowed us to enforce.

Mr. Culton: But the '38 Order was never enforced?

A. No, we were restrained by Court injunction—I mean the Commission was restrained by Court injunction.

Q. That is all.

(Whereupon, Court was recessed at 11:15 A.M., until 11:30 A.M., May 12, 1952, at which time the proceedings were resumed as follows:)

Redirect examination.

Questions by General Daniel:

Q. Mr. Murray, yesterday on cross-examination by Mr. Culton, you testified—no, I believe on your direct examination you testified that prior to 1930 it was not feasible for a large investment to be made by takers of natural gas for transmission on account of the flaring or the possibility of wastage of gas and not having sufficient reserves, because of the fact that we did not have any adequate conservation system in this State. On cross-examination Mr. Culton showed that several pipe lines were built into the Panhandle Field prior to 1930. Would you like to explain your statement or clarify your statement, those statements made [fol. 274] on direct and cross-examination?

A. Yes, I would.

Mr. Looney: Your Honor, may it be understood that we have the same objection to his redirect examination that we had to his direct, that it is wholly immaterial and irrelevant to any issue in this case?

The Court: The objection is overruled.

A. I have previously explained my lack of clarity yesterday in my thinking and my understanding of just what we were restricted to, and I was largely discussing general principles as applicable to the State as a whole. I do not retract in the slightest the general statement that it is not feasible to build a transcontinental pipe line into an area where terrific waste will take place. I may have left the impression that no pipe lines were built into the Panhandle until after the waste had been stopped. I actually didn't have in mind the dates when all of the lines were built into the Panhandle, but a good many of those lines, as was brought out in cross-examination, were built prior to the beginning of the large amount of wastage in the Panhandle, and I can state that those lines would have been severely adversely affected, those lines already built, had

the waste which began to occur after the lines were built had been allowed to continue. It is doubtful in my judgment whether the lines would ever have been able to amortize, if waste had continued at the maximum rate at which gas was wasted from the Panhandle Field.

By General Daniel:

[fol. 275] Q. During approximately what years did we have the greatest waste through flaring in the Panhandle Field?

A. No, I will have to qualify this, as was pointed out yesterday. In the early days of the Panhandle Field, my knowledge is hearsay, from reading articles, from talking to other people. I have some of the articles before me there that I can quote from, and part of my testimony of yesterday was certainly sophomoric, because I was recalling a paper I presented to the Simmons Science Club as a sophomore decrying the terrible waste of gas in the Panhandle Field. All of my information came from articles I read and not from any observation I made.

Q. You did make a study of the matter?

A. Yes, sir, but it wasn't first-hand knowledge. Most of my engineering education is based on hearsay, from the professor and then from reading the text books, but now as of—yesterday, you will recall the—

Mr. Looney: Just a moment. Your Honor, I think he might answer the question without giving a lecture every time. It takes so long a time. He just asked the question during what years the greatest wastage occurred in the Panhandle Field. That is a very short question, and calls for a very short answer.

A. From the articles which I have read, my recollection is that the greatest wastage was probably in '34. I have before me an article here—

Mr. Culton: We will agree to that, without you proving it. [fol. 276] A. That we were wasting one billion six hundred million daily in '34.

Q. (By General Daniel) If that had been allowed to continue by the Railroad Commission and the laws of this

State, would it have had an adverse effect on those pipe lines built prior to 1934?

A. It would have had a very severe adverse effect, and probably would have bankrupt them.

Q. Now, on the Goliad hypothetical question asked by Mr. Woodfin a minute ago, if an oil well had been discovered on your, in the area of your gas reserve or contemplated gas reserve and the take had been cut down by the Railroad Commission, would the system of nominations and other rules and regulations of the Commission have enabled the takers of natural gas for transmission to make nominations and obtain markets in other fields?

A. Yes, if—in a typical case of a pipe line company which does have this eventuality described here occur, and they find oil on the flank of a gas reservoir, and the take from the gas cap is restricted, then the Company solves that problem by simply upping its nominations from other fields to which it is connected.

Q. Do you consider that right a valuable privilege to, on the part of the takers of natural gas for transmission to make nominations from other fields than those in which they have dedicated gas.

[fol. 277] Mr. Culton: We object to that, because it is a conclusion, Your Honor. He can state the facts, and then the Court can determine the rights.

Mr. Woodfin: May I also object to that question? It is not so much an objection, Your Honor, but I would like for the Attorney General to repeat it, because if I understood him properly, I think he said, "Do you consider it a valuable right to be able to make nominations in fields from which you aren't taking gas?" And I didn't understand that the question prior to that had anything to do with that.

General Daniel: Would you read the question back, please?

(Said question was read as shown above.)

The Court: The objection is overruled.

A. I consider the right to make nominations an extremely valuable privilege to the gas purchasers, so valuable that I don't think they could operate without that privilege.

Mr. Woodfin: If the Court please, I want to object, in addition to our previous objection, to that answer and to that question, because I don't think they are talking about the same thing. The Attorney General has asked him about the value of making nominations in a field from which they aren't purchasing. All of the testimony here shows that gas companies only make nominations in fields where they are purchasing and taking gas.

[fol. 278] General Daniel: Did the Court rule on that?

The Court: Overruled.

A. My answer did not presume you were talking about fields from which they were not taking gas, and my answer was general, because I considered the privilege of making nominations generally, dedicated or non-dedicated reserves, a valuable privilege. The Commission never pays any attention to whether they are dedicated or not.

Q. (By General Daniel) We understood each other exactly. If the taking of the dedicated reserves has been cut down because of the finding of an oil field in the area, and then the nominations must be made in a field from which they are not then buying, under his hypothetical question; is that correct?

A. Well, they will have to get connected to the other field.

Q. That is right.

A. My answer was predicated on a Company being connected to several fields. If one of the fields is no longer permitted to produce the amount of gas that they have been taking in the past, the Company simply ups its nomination for the other fields and makes up the difference.

Q. Or it goes into another field and gets—

A. And ties-in, yes.

Q. And is it possible under your regulations for such a Company to go to a new field and get another market and make nominations therein under those circumstances?

A. It is permissible under our regulations. We don't [fol. 279] guarantee them that they can go find another market.

Q. It is permissible?

A. Yes.

Mr. Looney: It would be permissible if there weren't any regulations, too, wouldn't it?

A. Yes.

Mr. Woodfin: Commissioner, you don't have any regulation to tell a gas company where they can go buy gas, do you?

A. No.

Q. (By General Daniel) Mr. Commissioner, I was asking you the questions, and I will ask you for this purpose, I will put it this way. Do your conservation practices and rules and regulations in other fields, under an instance like Mr. Woodfin asked you about, would they be of some benefit to a gas taker who needs to find gas in some of these other fields?

A. Very definitely.

Q. After flaring was stopped in the Panhandle, did the existing lines expand and extend in those fields?

A. The existing lines in the fields—

Q. Yes.

A. —extended both connections in the field and their system, and my best knowledge of that is the increase in take. We have statistics on that. I am not intimately acquainted with the details of their system, but I think most of the lines have expanded their facilities, enlarged and extended.

[fol. 280] Q. That includes the lines built prior to 1930?

A. That is correct. At any rate, they are taking larger quantities of gas.

Q. Now, yesterday there was a question Mr. Culton asked you on which you could not give a yes or no answer. I believe that the substance of the question was that if there was a market and a fair price was offered, doesn't that stop the flaring of gas?

Mr. Culton: No, I never asked that.

General Daniel: Suppose you state it.

Mr. Culton: I never asked any such question as that, because I think I usually ask some questions that have some sense to them. That is nonsensical.

General Daniel: Do you remember the question?

Mr. Culton: I asked no such question as that.

General Daniel: You do remember the one that he would not answer?

Mr. Culton: Yes, but that wasn't the question.

Q. (By General Daniel) Do you remember the question that you could not give a yes or no answer on yesterday, Mr. Murray?

A. I remembered it as substantially the way you stated it then, not exactly.

Mr. Culton: Let's just hold up proceedings and get the question. No such question as that was ever asked.

A. Would you like for me to state my general understanding of his question?

[fol. 281] Q. (By General Daniel) I would like for you to state the understanding of the question Mr. Culton asked you yesterday on which you could not give a yes or no answer.

Mr. Looney: There were several of them.

A. My understanding was that he asked me when a market existed for gas, and I believe he used the words "and a fair price was being paid for the gas," wouldn't it be foolish for the operator to flare that gas; wouldn't he sell it instead. That was—

Mr. Culton: You answered that question, though.

A. I said I couldn't answer it yes or no. I wanted to give an illustration.

Q. (By General Daniel) Would you explain why you couldn't answer it yes or no, or give any answer to that question that is appropriate?

A. Yes. Absent conservation regulations prohibiting the flaring of gas, the mere existence of a market for gas at a price, whether it is a fair price or not, does not stop the flaring of gas. Now, it would seem obvious that it does, but I can give an illustration where it isn't hearsay; it is one of my own experiences on a lease of which I had supervision in the Panhandle Field. That is where I erred yesterday in trying to use an illustration out of the Panhandle Field, but a lease of which I had personal supervision. When I went to the lease, I found that even though a market existed for gas and a price was being paid for

that gas, we were—the producer that I was supervising the [fol. 282] lease for, was flaring large quantities of gas from the lease, because the market for the gas did not equal the capacity to produce gas, and so the producer would sell what gas he could, and then blow the air the rest of the gas which would seem foolish, because here he is blowing gas which he could sell, if he would wait, but his theory was, “Well, it will drain to me from the neighbors, so I had better just go ahead and get that liquid out of it. I can,” and the well was producing some black oil too. It was a statutory gas well, but it was producing casinghead gasoline and black oil. He said, “I will go ahead and go ahead and flare the rest.” Now, the point I am making is that merely the existence of a market afforded by pipe lines does not stop the wastage of gas. There must be conservation regulations prohibiting that wastage of gas, and forcing producers to produce only that amount of gas that can be utilized. Otherwise they will produce what they can sell, and then blow the rest, because they get a little bit of revenue from the amount they blow.

Q. We now have such conservation practices and regulations supervised by the Railroad Commission of Texas; is that correct?

A. That is correct.

Q. And have had during the past, during the months involved in this lawsuit, during all of this year?

A. Yes.

Q. As well as for several years back?

A. Yes.

[fol. 283]

Redirect Examination.

Questions by Mr. Mathews:

Q. Mr. Murray, during your cross-examination this morning by Mr. Culton, you had before you what has now been identified for the purpose of identification Defendants' Exhibit No. 2. During the recess, did you refresh your memory and recollection as to what that is?

A. I called the Supervisor of our Gas Department over, and he told me what it was.

Q. Is he in the courtroom?

A. Yes.

Q. What is his name?

A. Mr. James Hall.

Q. He is sitting back there?

A. Yes, sir.

Q. What is that, Commissioner Murray, that Exhibit?

A. That is the nomination for the purchase or use of gas, the form which we are now using in the Hugoton and West Panhandle Field.

Q. What is the date of that form?

A. 8-15-51.

Q. That is August 15, 1951?

A. That is right.

Q. And since that date, is that the form which the Commission has prescribed to be used in making nominations in the West Panhandle and Hugoton Fields?

[fol. 284] A. Yes, sir.

Mr. Mathews: We offer that in evidence, Your Honor.

(Said instrument was admitted in evidence as Defendants' Exhibit No. 2) (Shown Vol. I, Page 201)

A. It is the same form that I had earlier, but I was fearful that I—it was my impression that it was the form that was being used, and it might be in error, since Mr. Culton and I seemed to recall different forms, and I wanted to be sure of it.

General Daniel. That is all.

Recross Examination.

Questions by Mr. Culton:

Q. You do have a form, though, for nominations for gas well gas, don't you?

A. To be sure I am accurate, is it permissible for me to ask Mr. Hall?

Q. Well, you don't know then?

A. He tells me this is the form.

Q. I don't want to ask you what he told you. I am just asking if you know.

A. I think I know, but I am not positive.

Q. Do you get any nominations from Michigan-Wisconsin Pipe Line Company?

A. I do not know of my own knowledge.

Q. Do you get any nominations from Panhandle Eastern for the gas that it buys from Phillips Petroleum Company?

A. The same answer applies.

[fol. 285] Q. As a matter of fact—

A. I can get exact information immediately.

Q. I beg your pardon?

A. I can get exact information, but I will be careful and say I don't know.

Q. If you don't know the way it is operated, that is all right. I recognize the fact that the organization is entirely too large for you to know all of the details, but do you know whether they follow the practice up there of taking nominations from those who take gas at the well, natural gas at the well?

A. As I indicated yesterday, there has been some confusion as to just who was to nominate. Now, this form says it should be the first purchaser of gas.

Q. Now, is that natural gas or residue gas that that form is used for?

A. It says all gas.

Q. Well, do you use—

A. The term "residue" is not used, but—

Q. If you know, you can answer, and if you don't, I don't want you to guess, but do you know whether or not that form is executed by those who purchase residue gas at the outlet of gasoline plants?

A. I know that this form—first, let me say I don't know specifically who files the form.

Q. That is all.

[fol. 286] A. I could get that information, if you would like it.

Q. Well, that is all.

A. This does specifically provide that it shall include sweet or sour or casinghead gas.

Q. Just a minute. Casinghead gas is gas from which the liquids have not been extracted, isn't it?

A. Not necessarily.

Q. Well, it becomes residue gas—

A. We don't use the term residue gas. It is casinghead gas all the way through for us.

Q. And you make no distinction between natural gas and residue gas?

A. There is, as you will recall, we have three statutory definitions of gas.

Q. Yes.

A. Sweet natural gas, sour natural gas and casinghead gas, and whether it has been processed in a plant or not, it is still the same gas.

Q. But it isn't natural gas if it has been processed through a plant, is it?

A. Sir?

Q. It isn't natural gas if it has been processed through a plant, is it?

A. By statutory definition, it is sweet natural gas.

Q. After it has been processed through a plant?

A. Yes. Now, you would say it isn't natural, because [fol. 287] there have been some changes, but by statute, there are just the three different definitions, and whatever you do to it, it doesn't change it.

Q. What do you interpret natural gas to mean?

A. By statute?

Q. Yes.

A. Well, by statute—

Q. It means gas as it comes from a gas producing formation, doesn't it?

Mr. Looney: Just a moment, Your Honor. If you are going to give the statutory definition, I think you ought to read it out of the statute.

Mr. Mathews: Mr. Culton asked for it, Your Honor.

Mr. Culton: No, I asked what you call it.

Mr. Looney: Mr. Culton didn't ask for the statutory definition. I have been informed by a few lawyers that there is no statutory definition of natural gas.

A. I don't think there is. There is a statutory definition for sweet natural gas, sour natural gas, or sweet gas, sour gas and casinghead gas.

Mr. Looney: That is right.

A. And I know of no statutory definition of natural gas. It is all natural gas, to me as an engineer, as distinguished from manufactured gas.

Q. (By Mr. Culton) So, that is the only classification you have as between—

[fol. 288] A. Natural and manufactured.

Q. Between natural and manufactured gas?

A. Yes, sir. I regard casinghead gas as an engineer as natural gas.

Q. That is all.

Recross Examination.

Questions by Mr. Woodfin:

Q. Commissioner, you made great emphasis of the fact that stopping of flaring was of great benefit to these pipe line companies. You testified when I was questioning you a few minutes ago on cross-examination that the pipe line companies have been the greatest thing that had helped you stop the flaring of gas; is that correct?

A. Yes, sir, I agreed with you that kind of worked in a circle.

Q. That is right. If the pipe line is not there to take it, if you are going to produce any, if you are in an oil reservoir, you are going to produce that gas and get the oil. If the pipe line is not there to take that casinghead gas, the oil field has either got to be shut-in or else flare the gas or find some other use for it; is that correct?

A. Yes, sir.

Q. And until the pipe lines built into this country, you never found any use for it except that wasteful carbon black business, did you?

[fol. 289] A. For casinghead gas, that is right.

Q. For casinghead gas. Now, then, if we are in a field that is producing sweet gas and sweet gas alone, there is not going to be any flaring of gas to stop, is there, Commissioner?

A. Not since the conservation regulations went into effect and have been enforced, and that is of the greatest benefit to the pipe lines. It is what saved them, in my judgment.

Q. Now, Commissioner, you and I have been getting along pretty good, now, and we want to stay in the same reservoir. We are producing from a sweet gas field. Do

you know of any reason why a man would flare sweet gas, if he is not producing oil, and if he doesn't have any hydrogen sulphide in it, to take out the sulphur, which you had some out there in that West Coast country. We are in a—I mean that East country. We are in a sweet gas reservoir. Now, what has the Commission done to stop flaring from a sweet gas reservoir? There is going to be nothing produced from it, except to run it to a pipe line.

A. We have prohibited it. That is what stopped it. It seems silly, but One Billion, Six Hundred Million were flared daily in the Panhandle Field alone. That is sweet natural gas.

Q. I am a Goliad County man. I am trying to get you out of that Panhandle.

A. All right. They tried to keep me in there.

Q. I want to get you out of a sweet and sour gas reservoir. I have got you in a sweet gas reservoir.

A. All right, sir.

[fol. 290] Q. I have got you in a place where you can't make carbon black.

A. Yes, sir.

Q. And now I am asking you what earthly reason on earth would there be for flaring the reserves in the air?

A. Boy, that is a speech I have been making, but at one time 300 million cubic feet metered, and I guess it must have been lots larger than that, 300 million cubic feet of sweet natural gas was flared from the Old Ocean Field.

General Daniel: Per day?

A. Per day.

Q. (By Mr. Woodfin) Now, would that—

A. It didn't make sense to me, but they did it.

Q. Was it produced with oil?

A. No, sir.

Q. All right. If that pipe line had been in there to take that gas, you would then have no question of flaring that sweet gas, would you?

A. They flared 150 million feet a day after there was a pipe line in there.

Q. But not with sufficient capacity to take all of the gas; isn't that correct?

A. Well, you couldn't build one big enough to take all of the gas they could produce.

Q. That is right.

A. Of course, it would just last a few years.

Q. Now, then, I want to take you back to Goliad County. [fol. 291] You and the Attorney General have some idea that you can just switch those pipe lines around like a water hose out in the yard.

A. I don't. I have had to do it, and it ain't easy.

Q. All right. Now, do you have any idea—can you tell this Court what it costs under present day practice to build a mile of twenty-six inch pipe line?

A. No, sir.

Q. Well, if I told you it ran around \$60 or \$75,000, would you be surprised?

A. No, sir.

Q. All right. We are now—

A. I have never built any of that diameter. I have built a good bit of pipe line, supervised the building.

Q. All right. The pipe line you and I constructed in this courtroom this morning either had to be twenty-six or thirty inch to be an economical pipe line on those quantities we were talking about, didn't it?

A. Yes.

Q. All right. Let's take this twenty-six inch line, we have got it down there to our reserves in Goliad County. We bring that oil well in. Then the Attorney General says, "Well, all they have got to do is build over to another reserve and go over there and buy gas out of that reserve," and you agreed with him; is that right?

A. I stated that it would be the height of absurdity to build a twenty-six inch pipe line to one gas field. If anybody but the RFC would furnish the money for that, I [fol. 292] couldn't believe it. Excuse me, strike that.

Mr. Culton: Do you know of a single pipe line that has borrowed money from the RFC?

A. No, sir, I don't.

Mr. Culton: All right.

Q. (By Mr. Woodfin) Commissioner, if you will remember my situation this morning, what I told you this morning, I asked you in that case, I separated those reserves into a trillion here and a trillion over here. I don't think you understood that when I said that we were going to get 2

trillion feet of reserves, and we were going to build it on the reserves, and with one of those trillion foot reserves, we got into this oil proposition and that cut off, I said, half of our reserves. I don't think you understood it when I separated it, but let's suppose that we were bad engineers, and I happen to represent a pipe line that just built such a line, and I don't think they are bad engineers, but let's assume that we are all a bunch of bad engineers, and that is something about it, and that happens, is it a simple, easy proposition to go down and find another trillion feet of gas and build a pipe line to it and start taking from it?

A. No, it is no easy proposition.

Q. It is a practical impossibility, isn't it, Commissioner?

A. No, I wouldn't agree with that.

Q. I say practical from the standpoint of financing, get- [fol. 293] ting your line over there and coming back on your other reserves?

A. Yes, sir, if you got yourself in that jam, I think your financing is over.

Q. Now then, Commissioner, a trillion feet of gas undedicated in one reserve is very difficult to find, isn't it?

A. Yes.

Q. It is most difficult, isn't it?

A. Yes.

Q. Do you know of any uncommitted reserves outside of Katy and the Pledger Fields that contain more than a trillion feet of gas undedicated?

A. No, sir.

Q. All right. Now, we are getting down to the meat in this coconut. The fact of the matter is that you can't do it, if you lose any substantial amount of reserves, it is a practical impossibility to find any undedicated reserves in anything but a very unusual situation, that you wouldn't have already contracted for in that area, isn't it? Let's be practical. Let's talk sense here this morning.

A. Well, you are not talking sense to my kind of gas. Besides, you have got to have one gas field with a trillion feet of gas reserves in it, and that is the one you are going to build your line to.

Q. Commissioner—

A. Get a bunch, 100 million reserves. I agree with you—

Q. All right, let's take 100 million.

[fol. 294] A. It is hard to find them now. It is doggone hard to find productive oil acreage.

Q. And after you have built—

A. You are just coming into the picture a little late.

Q. Let's make you feel a little better. Let's have five fields that we are building into, and we buy everything in those particular areas that we can buy, but one of those fields drops out of it. There is a fifth of our gas supply gone. All right. Now, we are going to have to go find gas to make that up somewhere, if we are going to amortize our lines, aren't we?

A. Yes, sir.

Q. We have got to build a new line and find that, haven't we?

A. Yes, sir.

Q. We have got to find undedicated reserves to buy and get the gas, haven't we?

A. Yes, sir.

Q. The Commission or nobody else can tell a man that is selling his gas under a contract that is already dedicated, "Now, you sell this to John Jones"?

A. No, sir.

Q. Now, I have got to go find me a field that has got undedicated reserves and build me a twenty-six inch line to it at \$60 to \$75,000 a mile; isn't that right?

A. Yes.

Q. All right. And that is the protection I have got in that reserve when they find that little piddling oil well over [fol. 295] there, isn't it, because the Commission of the State of Texas and every other conservation Commission I know of says that you can get the oil, and the gas is always going to be there. Let's produce this oil, and you can get your gas later, but it certainly does tear up a timetable on a big, expensive \$150,000,000 proposition, doesn't it, Commissioner?

A. Yes, sir.

Q. That is all.

(Witness Excused).

Mr. Mathews: We rest.

Mr. Looney: We close.

General Daniel: We close.

(Thereupon, Court was recessed until June 30, 1952, at which time the proceedings were resumed as follows:)

[fol. 296]

MORNING SESSION

JUNE 30, 1952

Mr. Looney: It is stipulated that subsequent to the filing of the written Stipulation herein on, to-wit, May 13, 1952, Plaintiff paid taxes covering the taxable periods of April and May, 1952, for the month of April, 1952, on 8,243,565 MCF, taxes being in the sum of \$37,096.04, and that covering the month of May, 1952, for the gas produced during said month paid taxes on 10,093,494 MCF, said taxes paid being in the sum of \$45,420.72, such payments having been made within the time permitted by law to the State Comptroller of Public Accounts and having been handled subsequent thereto in precisely the same manner as set forth in the original Stipulation and as alleged in Plaintiff's Third Amended Original Petition filed herein on June 30, 1952.

In all three of said cases the payments were made accompanied by a written protest filed with the State Comptroller, in which the grounds of protest were the same as set forth in the original Stipulation and in Plaintiff's Third Amended Original Petition in each case.

Your Honor, the Plaintiff in each of these three cases has some additional documentary evidence to offer in each case, and the Plaintiffs in each case through their attorneys of record have heretofore advised the Attorneys for the Defendants of what the evidence consisted of. We would like to offer in evidence in each of the three cases to carry [fol. 297] the correct exhibit number, being the next succeeding exhibit number after the last one that was introduced on May 12 and 13, first, this Certificate from the Comptroller of Public Accounts.

Mr. Geppert: The Defendants object to the introduction of the document on the ground it is irrelevant and immaterial and doesn't bear on any issue involved in this lawsuit.

The Court: Objection overruled.

Mr. Geppert: Note our exception.

(Said instrument was admitted in evidence as Plaintiff's Exhibit No. D, and the same is shown herein at Page 173.)

Mr. Looney: Next we offer in evidence in each of the three cases another Certificate from the Comptroller of Public Accounts dated June 24, 1952, which we will ask the Reporter to mark temporarily as Plaintiff's Exhibit "B" as of this date and place the appropriate number on it subsequently.

Mr. Geppert: We make the same objection, just like we did on the exhibit which has been marked temporarily as Plaintiff's Exhibit "A".

The Court: Same ruling. Objection overruled.

Mr. Geppert: Note our exception.

(Said instrument was admitted in evidence as Plaintiff's Exhibit No. E, and the same is shown herein at Page 174.)

(Whereupon, Court was recessed until July 30, 1952, at which time the proceedings were resumed as follows:)

[fol. 298]

MORNING SESSION

JULY 30, 1952

Mr. Looney: By agreement all of the evidence and stipulations heretofore offered by all parties are re-offered as of June 30, 1952. In 91,338, Michigan-Wisconsin Pipe Line Company versus Robert S. Calvert, et al, it is stipulated that the Original Petition was filed on January 2, 1952, the First Amended Original Petition on March 17, 1952, Second Amended Original Petition, May 12, 1952, Third Amended Original Petition, June 30, 1952, and Fourth Amended Original Petition July 29, 1952, and that taxes which were due not later than July 25, 1952, covering the month of June, 1952, were paid by the Plaintiff Michigan-Wisconsin Pipe Line Company prior to July 25, 1952, in the sum of \$41,994.68.

EVIDENCE CLOSED

[fol. 299]

PLAINTIFF'S EXHIBIT No. D

The State of Texas
County of Travis

I, Robert S. Calvert, Comptroller of Public Accounts, certify that according to the records of my office:

1. The sum of \$1,761,202.51, collected under authority of Article 6032, V.C.S., was deposited in the State Treasury during the fiscal year ending August 31, 1951.

2. The sum of \$783,710.56 was transferred from the Oil and Gas Enforcement Fund to General Revenue Fund under authority of Article 6032-e, V.C.S., as the unencumbered balance of the 1950-1951 appropriations.

3. The sum of \$237,693.19 was transferred from the Gas Utilities Fund to the General Revenue Fund under authority of Article 6066, V.C.S., as the unencumbered balance of the 1950-1951 appropriations.

Given under my hand and seal of office this 20th day of June, A.D., 1952.
(SEAL)

/s/ Robert S. Calvert,
Comptroller of Public Accounts

[fol. 300]

PLAINTIFF'S EXHIBIT No. E

State of Texas

Comptroller's Department

I, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, do hereby certify that the records of this Department reflect that tax, penalty and interest has been paid provided for by Article 7057f, V.C.S. for the period September 1, 1951 to April 30, 1952 inclusive in the amount of \$7,961,965.89. Of that amount \$4,645,438.72 is in Suspense.

Given under my hand and Seal of Office at Austin, Texas this 24th day of June, 1952.

/s/Robert S. Calvert, State Comptroller of Public
Accounts. (Seal.)

[fol. 301] DEFENDANTS' EXHIBIT 1-A—Page 1

Railroad Commission of Texas

Oil and Gas Division

Oil and Gas Docket No. 108

#10-12,677

IN RE: Conservation and Prevention of Waste of Crude
Petroleum and Natural Gas in the Texas-Hugoton Field,
Sherman, Moore, and Hansford Counties, Texas

Austin, Texas

June 28, 1948

SPECIAL ORDER

Adopting and promulgating field rules for the Texas-
Hugoton Field, Sherman, Moore, and

Hansford Counties, Texas

Whereas, After notice duly given, the Railroad Commission of Texas held a hearing in the Herring Hotel, at Amarillo, Texas, on January 28, 1948, which hearing had been originally set for November 20, 1947, and subsequently postponed to the later date; the purpose of said hearing being to enable any and all parties desiring to do so to place before the Commission information concerning the following enumerated issues:

(1) Whether the gas producing Hugoton area of Texas is a part of what is called the Hugoton Field underlying the states of Oklahoma and Kansas.

(2) Whether the Hugoton area of Texas is separate from the Panhandle Field Proper lying within the state of Texas and more specifically in the counties of Wheeler, Gray, Carson, Potter, Hartley, Hutchinson, and Moore.

(3) Whether the Hugoton area of Texas, if found to be separate from the Panhandle Field proper, should be pro-[fol. 302] rated; and if so, what method proration should be adopted to apply thereto; and what, if any, additional special rules should be adopted to apply to this area.

(4) Whether, in the event that the Hugoton area of Texas should be found to be a part of the Hugoton Field lying within the states of Oklahoma and Kansas, the Commission should adopt and make applicable to the Texas portion of this field rules and regulations similar to those rules and regulations heretofore adopted by the states of Oklahoma and Kansas to apply in those portions of the field that lie within each respective state, and particularly whether there should be adopted for the Texas portion, an allocation formula similar to that employed for that portion of the field lying within the states of Oklahoma and Kansas; and

Whereas, It appears to the Commission from the evidence submitted at the aforesaid hearing and from such additional evidence as was furnished in connection with a further hearing on the subject that was held in the Highway Building, at Austin, Texas, on June 16, 1948, and the Commission finds therefrom:

(1) That the gas producing reservoir from which production is had through wells located in the Hugoton Field area of Texas is connected with and is a continuing part of a gas producing reservoir that extends into and underlies parts of the states of Oklahoma and Kansas.

(2) That there is an area or section in Moore County, Texas, lying immediately to the northwest of the Texas [fol. 303] Panhandle Field Proper, where the permeability in the gas producing reservoir in question is of a low order, and where the probable section of the reservoir that might produce gas is narrow in width; that reservoir pressures to the north and west of this reservoir barrier are, on the average, considerably higher than are reservoir pressure values to the south and east thereof; that migration of gas from the Texas Panhandle Field Proper to the Texas-Hugoton Field area across this reservoir barrier, if any has heretofore taken place, has been and will probably continue to be negligible; that for practical purposes, involving development, production, and allocation of allowable, it is desirable to continue as separate field entities the Texas-Hugoton Field and the Texas-Panhandle Field Proper; that by reason of the indicated existence of the aforementioned reservoir barrier, it is both practicable and

feasible to maintain the said two fields as separate field entities for developmental and operational purposes; that for practical purposes, and to effectuate such a division, it is necessary to set up, in terms of ground surface markers, a line separating the said two fields; and that the line hereinafter set up for this purpose follows the general trend of the aforesaid subsurface or reservoir barrier that exists between these two fields; that said line of separation, as hereinafter established, is a reasonable and logical one, and that the effect of its use for such purpose will not result in discrimination as between wells that might produce in the area, and will not result in inequities as between properties located in the vicinity thereof.

[fol. 304] (3) That waste, as the term is defined in the applicable Statutes of the state, is imminent in the Texas-Hugoton Field and will probably take place therein along with the unratable production of gas unless rules, regulations, and orders are adopted by the Commission for the prevention thereof; that to prevent waste in said field and to insure the ratable production of gas therefrom, it is necessary among other things to institute a program of gas proration in the field; that unless there be ratable production of gas from, and as between, producing properties in said field, there will result an acceleration of the reservoir pressure differentials now existing between such properties occasioned by production practices heretofore followed; that undue, preventable, and cognizable drainage between properties in the field will, in all probability, be accentuated by the further development of the field and the development of additional markets for gas therefrom unless a gas allocation formula is placed into effect in the field at this time, and unless other rules and regulations are adopted to apply thereto that will insure a proper and orderly developmental program.

(4) That the testimony of technical experts, who testified before the Commission concerning the questions before the Commission at the hearings in the cause, are in general agreement with regard to the fact that an acreage factor should be given proper weight in any allocation formula which would seek to accomplish the ratable production of gas in the Texas-Hugoton Field, and that an

[fol. 305] acreage factor should be given proper weight in any allocation formula which would seek to accomplish the ratable production of gas in the Texas-Hugoton Field, and that proper consideration should also be given to other factors including well potential, reservoir pressure, porosity, permeability, and thickness of the pay formation; that the testimony of these technical experts is also in substantial agreement that due consideration is given the factors of well potential, reservoir pressure, permeability, porosity, and pay thickness when the factor of deliverability is properly taken into account in a gas allocation formula to apply to said field.

(5) That the testimony of technical experts, who testified in this case, is also in general agreement to the effect that the standard drainage unit for gas wells in the said Texas-Hugoton Field should be fixed at 640 acres, and that wells completed therein on a density basis approximately one well to each 640 acres will afford adequate and efficient reservoir drainage.

Whereas, Based on the factual findings of the Commission as hereinabove set out, which findings it believes to be substantiated by the preponderance of the evidence adduced in this case, the Commission is of the opinion and further finds that it is necessary to adopt special rules and regulations to apply to the Texas-Hugoton Field at this time; and that the special rules and regulations hereinafter set out are necessary to prevent the waste of gas therein and to insure the ratable production of gas therefrom.

Now, Therefore, It Is Ordered By the Railroad Commission of Texas that the line separating the said Texas-Hugoton Field (which lies in part of the counties of Sherman, Hansford, and Moore) from the Texas Panhandle Field Proper (which lies in part in Potter, Moore, Gray, Wheeler, Hutchinson, Carson, and Hartley Counties) be and the same is hereby fixed as a straight line running in a northeasterly direction and connecting the two points represented by the southwest corner of Section 408, Block 44, H&TC Railway Survey, Moore County, Texas, as the first point; and the center of the west line of Section 100, Block 3-T, T&NO Railway Survey, Moore County, Texas, as the second point; and by a further straight line running

in a more easterly northeast direction and joining the two points represented by the center of the west line of Section 100, Block 3-T, T&NO Railway Survey, Moore County, as the first point; and the point where Moore, Sherman, Hansford, and Hutchinson Counties join as the second point.

It is further ordered By the Commission that the present gas producing area lying immediately north and west of the line described in the preceding paragraph and continuing into Sherman and Hansford Counties be and the same is hereby designated as the Texas-Hugoton Field, and that the following rules and regulations, in addition to such of the Commission's general rules and regulations as are not in conflict therewith, be and the same are hereby adopted to apply to the said Texas-Hugoton Field which, at this time, is known to underlie portions of Moore, Sherman, and Hansford Counties, Texas.

[fol. 307] *Rule 1:* No gas well shall hereafter be drilled in said field at any point less than twenty-five hundred (2500) feet from any other gas well that is completed in or drilling to the same producing reservoir and which is located on the same lease, unitized tract or farm; or at any point nearer than twelve hundred fifty (1250) feet to any boundary line of such lease, unitized tract or farm; provided, however, that the Commission will, in order to prevent waste or to prevent the confiscation of property, grant exceptions to permit of drilling within shorter distances than herein prescribed whenever such is shown to be necessary either to prevent waste or to prevent the confiscation of property. When an exception to this rule is desired, application therefor shall be made and will be acted upon in accordance with the applicable provisions of Commission's Statewide Rules 37 and 38, which *application* provisions of said rules are incorporated herein by reference.

In applying this rule, the provisions of general order of the Commission relating to the subdivision of property shall be observed.

Rule 2: The reasonable, lawful required production of gas from said field shall be determined by nominations for the production from gas wells producing from the same

horizon therein submitted in affidavit form. However, the Commission will adjust the allowable production as determined by this method to be the actual production from the field as determined from its records.

[fol. 308] *Rule 3:* The daily total gas allowable for the field as fixed by the Commission, after deductions have been made for wells which are incapable of producing their allowables as determined hereby, shall be distributed among the remaining producing wells in the field on the following basis:

The daily allowable production of gas from individual wells shall be determined by the proportion that the produce of the deliverability and the acreage attributable to such well bears to the summation of this product with respect to all the wells in the Texas-Hugoton Field.

Rule 4: The deliverability of a well is hereby defined as the ability of said well to produce gas at a working pressure equivalent to eighty per cent (80%) of the shut-in wellhead pressure of that well. The deliverability of every well in the Texas-Hugoton Field shall be determined as follows:

(1) Production prior prior to obtaining shut-in pressure: Each well to be tested shall be produced into a pipe line for a period of not less than seventy-two (72) continuous hours immediately preceding the time it is shut-in for the purpose of obtaining the shut-in wellhead pressure thereof. The daily rate of production during this producing period shall, in the case of wells the allowable for which is set forth on a Commission adopted proration schedule in effect at the time the well is tested; and shall, in the case of wells the allowable for which is not set forth on a Commission adopted proration schedule, be the normal producing rate at which such wells are ordinarily produced.

(2) *Taking of Pressures:* All shut-in pressures and flowing pressures shall be obtained by use of a dead weight gauge and shall be taken in the presence of a representative of the Railroad Commission of Texas. Each well to be tested shall be shut-in for a period of approximately seventy-two (72) continuous hours, but in no case less than

sixty-six (66) continuous or more than seventy-eight (78) continuous hours. At the end of this shut-in period, the pressure at the wellhead shall be measured with a dead weight gauge to establish the shut-in wellhead pressure. If the representative of the Commission shall have any reason to believe that the shut-in wellhead pressure thus obtained is incorrect, he may require that such well be blown to clean fluids from the well bore, or take any such other reasonable steps as may be necessary to obtain the true shut-in wellhead pressure of the well. In the event that more than one shut-in wellhead pressure is taken on a well during the test period, the highest such shut-in pressure obtained shall be used in computing the deliverability of such well.

(3) *Deliverability Rate*: Immediately after the completion of the shut-in wellhead pressure test, the deliverability rate shall be determined by producing the well into the pipe line for approximately seventy-two (72) continuous hours, during which time the working pressure at the wellhead shall be maintained as closely as possible at eighty per cent (80%) of the shut-in wellhead pressure of the [fol. 310] well expressed in pounds per square inch gauge. In no case shall the working wellhead pressure during the deliverability test be more than ninety per cent (90%) or less than seventy per cent (70%) of the shut-in wellhead pressure of the well being tested unless it can be shown to the satisfaction of the Commission Agent that it is impracticable to maintain the pressure within the above described limits and that the accuracy of the test will not be unduly affected by the failure to do so. Flow shall be measured by an approved orifice meter throughout the seventy-two (72)-hour test period and the wellhead pressure shall be measured by a dead weight gauge at the close of the test period. The rate at which the well is producing at the end of seventy-two (72) hours will be considered to be the stabilized producing rate corresponding to the working wellhead pressure existing at that time, provided such rate is not greater than the average hourly production rate for the entire seventy-two (72)-hour period. If the working wellhead pressure at the close of the test period is exactly equal to eighty per cent (80%) of the

well's shut-in pressure, then the corresponding stabilized producing rate expressed in MCF per day at a base temperature of sixty degrees (60°) Fahrenheit and a base pressure of 14.65 p.s.i. absolute shall constitute the well's deliverability. If the wellhead pressure at the end of the test period is either greater or less than eighty per cent (80%) of the well's shut-in pressure, the observed stabilized producing rate shall be converted to deliverability by the [fol. 311] use of the following formula:

$$D = R \left(\frac{P^2 - P_d^2}{P^2 - P_w^2} \right) .85$$

Where

D = deliverability, MCF per day at 14.65 p.s.i. and 60° F

R = Observed producing rate, MCF per day at 14.65 p.s.i. and 60° F

P = shut-in pressure of the well tested, p.s.i. absolute

P_d = deliverability pressure, 80% of well's shut-in pressure, p.s.i. absolute

P_w = working wellhead pressure at rate R, p.s.i. absolute

Rule 5:

(1) For the purpose of establishing the allowable for a gas well in the Texas-Hugoton Field, Sherman, Moore, and Hansford Counties, Texas, the standard proration unit shall be six hundred forty (640) continuous and contiguous acres; provided, however, that a tolerance acreage of not to exceed *fifty per cent (15%)* of the standard proration unit may be allowed on producing tracts of more than six hundred forty (640) acres when the size and shape of the tract warrants.

(2) All acreage in any proration unit shall consist of productive acreage; that is, acreage that lies, according to the best subsurface information available within the productive limits of the field.

(3) No acreage shall be included in any proration unit formed or created after the effective date of this order [fol. 312] and allocated to the well drilled thereon for any purpose unless the most distant boundary of such acreage sought to be included in such unit is within seventy-eight Hundred (7800) feet of such well to which it is assigned;

provided, however, that the provisions of this portion of this rule shall not apply to proration unit or proration units or the well or wells drilled thereon if such proration unit or units shall have been formed and the well or wells thereon shall have been commenced or completed prior to the effective date of this order.

(4) The term "proration unit" as used in this order shall mean continuous and contiguous acreage in an amount not to exceed a maximum of seven hundred thirty-six (736) acres and in which acreage all gas interests concerned are common to all of such acreage or in which all parties having gas interests therein have pooled or unitized all of their interests in and under such acreage in such manner as that, for the purpose of drilling and operating gas wells located thereon, all of such acreage may be considered as one leasehold estate, the same *is* if leasehold rights with respect thereto had been acquired by virtue of one lease contract. The operator of any well or wells located on a proration unit consisting of acreage that has been pooled or unitized for the purpose of drilling and operating gas wells located thereon shall furnish the Commission with [fol. 313] such proof as the Commission may require as evidence that all of the interests in and under such proration unit have been so pooled or unitized.

(5) Operators shall file with the Commission certified plats of their properties in said field, which plats shall set out distinctly all of those things pertinent to the determination of the acreage credit claimed for each well thereunder.

Rule 6: Allowable for newly completed wells shall be effective the date their deliverability is ascertained as outlined in Rule 4 of this order.

Rule 7: Deliverability tests shall be made once a year on all wells in the Texas-Hugoton Field as outlined in Rule 4 of the above field rules and shall be made under the supervision of the Commission Agent. The first deliverability survey shall be made during the month of July, 1948, and each year thereafter during the same month, another deliverability survey shall follow.

Rule 8: Underproduction

(1) In the event there shall not be produced from any gas well in the Texas-Hugoton Field during any one month as much gas as is allocated thereto under schedules of well allowables issued under orders of the Commission, the operator of any such well shall be permitted to carry forward to the succeeding month, as allowable gas to be produced during the succeeding month from such well, the amount of such month's underproduction for that well.

(2) In like manner, any gas well may be underproduced [fol. 314] for a period not to exceed six (6) consecutive months and may produce the accumulated underproduction in addition to the regular monthly allowable during the following six (6) months' period, subject to the limitations imposed by the next succeeding paragraph (3) hereof.

(3) In making up such underproduction, no well shall be produced in any one month in excess of twice its current monthly allowable or produced at a daily rate in excess of twice its current daily allowable as fixed by the Commission, or produced in such manner that waste is occasioned thereby.

Rule 9. Overproduction

(1) Each operator of each gas well in the Texas-Hugoton Field, may produce such well in excess of the monthly allowable allocated to such well, provided (a) no waste is occasioned thereby and provided (b) no well shall in any one month be permitted to produce in excess of twice its current monthly allowable or to produce at a daily rate in excess of twice its current daily allowable as fixed by the Commission.

(2) When any well has produced twice its current monthly allowable for six successive months, same shall be closed in until its production and allowable are in balance.

(3) Production from all wells in the field that are overproduced on the 1st day of March or on the 1st day of September of each year shall be thereafter restricted to such fractional part of their monthly allowable as will bring the accumulated allowables and accumulated monthly [fol. 315] production in balance during the next ensuing six months.

Rule 10: Each producer, purchase-, pipe line, or operator producing or taking gas from wells classified as gas wells in the Texas-Hugoton Field, Sherman, Moore, and Hansford Counties, Texas, shall prepare regular monthly reports upon forms furnished by the Commission and according to instructions set out on said forms.

It is recognized by the Commission that the placing in effect of the gas allocation formula prescribed herein must await the determination of the deliverability rate for those wells in the field that are presently connected to pipe line outlets; further, that operators must file plats showing the acreage assignment to individual wells before a proration schedule allocating allowable gas production in the field can be compiled. Accordingly, it is ordered by the Commission that all of the rules hereinabove set forth to apply to the Texas-Hugoton Field, except Rule 3 thereof, be and the same are hereby made effective as of July 1, 1948; and that Rule 3 thereof be and the same is hereby made effective as of September 1, 1948.

It is further ordered That this Cause be held open on the Docket for such other and further orders as may be necessary and supported by evidence of record.

Railroad Commission of Texas, Ernest O. Thompson,
[fol. 316] Chairman, W. J. Murray, Jr., Commissioner,
Olin Culberson, Commissioner. (Seal.)

Attest: K. C. Miller, Secretary.

[fol. 317]

DEFENDANT'S EXHIBIT No. I-B

Railroad Commission of Texas

Oil and Gas Division

Oil and Gas Docket No. 108

#10-17, 596

In Re: Conservation and Prevention of Waste of Crude Petroleum and Natural Gas in the Texas-Hugoton Field, Sherman, Moore and Hansford Counties, Texas

Austin Texas, February 6, 1950

Special Order

Amending Commission Order No. 10-12677, Dated June 28, 1948, as Applies to Rules 8 and 9 of Said Order Adopting Field Rules for the Texas-Hugoton Field, Sherman, Moore, and Hansford Counties, Texas

Whereas, the 50th Legislature did on May 22, 1947, pass Senate Bill No. 431, said bill authorizing the Commission to permit balancing out of underproduction and overproduction of the allowables of gas wells in a given six months period if no waste is occasioned thereby; and

Whereas, the Commission did, as the result of a prior hearing, adopt a six months overproduction-underproduction balancing rule for gas wells in the Texas-Hugoton Field, Sherman, Moore, and Hansford Counties, Texas, by effecting Rules 8 and 9 of Order No. 10-12677, dated June 28, 1948; and

Whereas, the Commission is now of the opinion that operating procedures would be standardized and previous rules clarified and placed in strict conformity with Senate Bill No. 431 and that no waste would result by the amendment as hereinbelow outlined,

[fol. 318] Now, therefore, it is ordered by the Railroad Commission of Texas that effective September 1, 1949, Rules 8 and 9 of Commission Order No. 10-12677 be and

the same are hereby amended so as to hereinafter read and provide as follows:

Rules 8 and 9:

(A) For the purpose of computing and balancing overproduction and underproduction in the Texas-Hugoton Field, Sherman, Moore and Hansford Counties, Texas, the dates 7 a. m., March 1, and 7 a. m., September 1 are to be known as "Balancing Dates"; and the six months period beginning 7 a. m. March 1 and ending 7 a. m. September 1, and beginning 7 a. m. September 1 and ending 7 a. m. March 1, will be considered as separate entities and will be known as "Balancing Periods."

(B) Underproduction

(1) In the event there shall not be produced from any gas well in the Texas-Hugoton Field, during a balancing period, as much gas as is allocated thereto under Orders of the Commission, the operator of any such well shall be permitted to carry such underproduction forward to the next succeeding balancing period, as future allowable credit, to be produced during that period.

(2) The amount of underproduction to be carried forward into any new balancing period as allowed production during such new balancing period, shall consist of the actual underproduction that accrued in the balancing period [fol. 319] immediately preceding such new balancing period, and the accumulative well status, as to underproduction, will be adjusted on each balancing date accordingly.

(3) Underproduction as pertains to any well shall not be made up at a rate in excess of twice the daily average rate required to produce the normal current monthly allowable of the well or at a rate in excess of twenty-five (25) per cent of the daily open flow capacity of the well, as found by the Commission, whichever is the smaller rate.

(4) With respect to a producing well that has been accumulatively underproduced on each of two successive balancing dates, such well shall not be assigned a monthly allowable greater than the maximum monthly production had from such well during the immediately preceding

balancing period; provided, however, that such limited allowable as is assigned such well hereunder may be adjusted to a value not to exceed the allowable accruing to such well under the allocation formula, *upon certification to the Commission from the operator thereof that such well is producing gas in excess of the limited allowable assigned it.*

(C) *Overproduction*

(1) Each operator of each gas well in the Texas-Hugoton Field, may, subject to the hereinafter prescribed conditions, produce such well in excess of the monthly allowable allocated to such well, provided that no well shall in any one month produce at a rate in excess of twice the daily [fol. 320] average rate required to produce the normal current monthly allowable of the well or at a rate in excess of twenty-five (25%) per cent of the daily open flow capacity of the well, as found by the Commission, whichever is the smaller rate.

(2) Any well overproduced as of a balancing date, *and which well was also overproduced on the balancing date immediately preceding and remained overproduced for the entire period between the two balancing dates*, shall be shut-in until the overproduction, existent as of the later of such two balancing dates, is made up; this unless exception is had as provided for in the next succeeding paragraph hereof.

(3) The operator of a well which, under the provisions of the immediately preceding paragraph, would be required to be shut-in may, if such operator is of the opinion that complete well shut-in will materially damage his well, request a hearing before the Commission, which hearing will be held only after due notice is given to all operators in the field. If, after consideration of the evidence submitted at such hearing, the Commission finds that such well should not be completely shut-in, the Commission may allow the overproduction charged against it to be made up at a lesser rate than it would be made up if the well were completely shut-in.

(4) Except where well shut-in is required in making up overproduction (See Paragraphs (2) and (3) above), over-

production existent as of any balancing date shall be made up during the balancing period immediately following, and [fol. 321] may be made up at any time during such period, i.e., a specified fractional part of such overproduction need not be made up during each month of such balancing period, so long as all of such overproduction is made up during such balancing period.

It is further ordered that this cause be held open on the docket for such other and further orders as may be necessary.

Railroad Commission of Texas, W. J. Murray, Chairman, Olin Culberson, Commissioner; Ernest O. Thompson, Commissioner. (Seal.)

Attest: O. D. Hyndman, Secretary.

[fol. 322] DEFENDANTS' EXHIBIT No. I-C

Railroad Commission of Texas, Oil and Gas Division
Oil and Gas Docket Numbers 108, 120, 123, 124, 125, 126, 128,
129, 132 and 146

No. 20-550

In Re: Conservation and Prevention of Waste of Crude
Petroleum and Natural Gas in the State of Texas

Austin, Texas
January 18, 1939

*General Order Classifying Wells Producing
Condensate in the State of Texas*

Whereas, Article 6008, of the Revised Civil Statutes of Texas, 1925, as amended, vests in the Railroad Commission of Texas a broad discretion in the administration of such statute and to that end authorizes the Railroad Commission of Texas to adopt any and all rules, regulations and orders which are found necessary to effectuate the provisions and purposes of said statutes in the prevention of

waste in the production and use of natural gas within the State; and

Whereas, Under other statutes, including Articles 6014, 6026, 6049a, 6049b, and 6049d, the Railroad Commission of Texas is vested, authorized and directed to make and enforce rules, regulations and orders for the conservation of crude petroleum oil and natural gas and to prevent the waste thereof, and to make and enforce all such rules, regulations and orders as may be necessary to that end; and

Whereas, The Railroad Commission of Texas and its agents and representatives have for the past several years [fol. 323] made intensive studies concerning the classification of wells in the State of Texas which produce high gravity, highly volatile liquids at high gas-liquid ratios, the methods of producing such wells in order to obtain the greatest ultimate yield from the reservoirs in which said wells are located, and the proper utilization and disposition of natural gas produced from such wells. In connection with such studies the Commission has held hearings after due notice, including the hearings held on February 23, 1938, November 30, 1938, and December 13, 1938, and as a result of such studies and hearings the Commission has found and concluded that there are numerous wells located within the State of Texas which produce a high gravity highly volatile liquid which is usually termed "condensate" or "distillate," which liquid cannot be properly classified as crude petroleum oil as that term is generally known in the industry. The wells producing such products as are termed "condensate" or "distillate" are wells, with few, if any exceptions, from which liquids are obtained at the surface, which liquids are in the gas phase in the reservoir and are formed by the decrease in pressure and temperature occurring after the gas in which such liquids are contained leaves the reservoir; and

Whereas, The Commission further finds that such problem as to the production of such condensate or distillate is encountered where natural gas is found at comparatively great depths and high pressures; and [fol. 324] Whereas, The Commission further finds that if the pressure in such high pressure natural gas reservoirs is reduced, the gas-liquid ratio is increased if the condi-

tions under which such liquid is separated from the gas remains the same; and

Whereas, The Commission further finds that numerous questions have arisen *which* reference to the administration of Article 6008 and other articles relating to the conservation of crude petroleum oil and natural gas in the State of Texas as to whether such wells producing such condensate or distillate may be properly classed as oil wells or gas wells within the provisions of such statutes; and

Whereas, The Commission further finds that a condensate well is one in which the liquid- obtained at the surface are in the gas phase in the reservoir and are formed by the decrease in pressure and temperature which occurs after such gas leaves the reservoir; that such condensate wells produce hydrocarbon liquids which are usually water-white in color and are not crude petroleum oil within the provisions of Article 6008.

Whereas, The Commission further finds that if the pressure in a high pressure gas phase reservoir is allowed or permitted to drop, a liquid will condense out of such gas phase which liquid will wet the sand grains in the reservoir, and a large portion of the liquid formed in this manner will not be recoverable from the reservoir unless [fol.325] the pressure of such reservoir be raised back to its original value; and

Whereas, The Railroad Commission of Texas further finds that in some fields in the State of Texas the operators of wells producing condensate or distillate are producing natural gas from such fields, extracting such condensate or distillate and then permitting such natural gas to be blown or released into the open air, resulting in tremendous waste of natural gas and failure to recover the large portion of the extractable liquid which remains in the reservoir *unrecoverable*; and that under the provisions of Article 6008 the gas produced from such wells may only be used for light or fuel purposes, efficient chemical manufacturing, repressuring gas lift in the production of crude oil, and recycling where such gas may be classified as sweet gas under the provisions of Article 6008 and where such gas is classified as sour gas under the provisions of Article 6008

same may also be used for the manufacture of carbon black under the conditions provided by such statute; and

Whereas, The Railroad Commission further finds that unless immediate and present orders, rules, and regulations are promulgated and enforced by the Commission such irreparable loss of natural gas will be continued to the great detriment of the State and its citizens:

It is therefore ordered by the Railroad Commission of Texas that all wells within the confines of the State of Texas which produce hydrocarbon liquids which [fol. 326] are condensation products from a gas phase are hereby classified as gas wells under the provisions of Article 6008 and the use of the natural gas produced from such wells shall be restricted to the purposes and uses provided for in Article 6008 for the type of gas produced; that all wells producing hydrocarbon liquids, a part of which is formed by a condensation from a gas phase and a part of which is crude petroleum oil, shall be classified as gas wells, and the natural gas produced from such wells shall be devoted to the uses and purposes described and set out in Article 6008 as the purposes and uses for which natural gas from gas wells may be used, unless there is produced one barrel or more of crude petroleum oil per one hundred thousand cubic feet of natural gas; and that the term "crude petroleum oil" as used in this order shall not be construed to mean any liquid hydrocarbon mixture or portion thereof which is not in the liquid phase in the reservoir, removed from the reservoir in such liquid phase, and obtained at the surface as such.

It is further ordered by the Railroad Commission that this Docket shall be kept open for the reception by the Commission of any and all petitions or complaints as to hardships or any inequalities claimed to arise by reason of the operation of this order.

Railroad Commission of Texas, Lon A. Smith, Chairman; Ernest O. Thompson, Commissioner; Jerry Sadler, Commissioner. (Seal.)

Attest: C. F. Petet, Secretary.

[fol. 327] DEFENDANTS' EXHIBIT No. 2

R. R. C. T. District No. —, Form GN

Railroad Commission of Texas, Oil and Gas Division, Gas
Department, Austin, Texas

Amended Form GN—8/15/51

Nomination for the Purchase, or Use of Gas

Company Filing Nomination.
Address
Date Submitted
Nomination for Month of
Kind of Gas Included in This Report (Sweet or
Sour) of (Casinghead).

(Follow Instructions on Reverse Side)

<i>Field Name</i>	<i>Producers Name</i>	<i>Total for Month MCF</i>
Total Estimated Requirements for Entire District —		
MCF.		

The above estimated requirements of gas to be produced during the month of _____ will be taken and utilized in accordance with the Laws of the State of Texas, and the Rules, Regulations and Orders of the Railroad Commission of Texas.

State of Texas

County of _____

Before me, the undersigned authority on this day per-
[fol. 328] sonally appeared _____ who, after
being by me duly sworn on oath states that he represents
the reporting company in the capacity of _____, and
that said report contains no mis-statements or inaccuracies
within the knowledge of the affiant, and that no pertinent
matter inquired about in this report and within the knowl-
edge of said affiant has been omitted.

_____. (Signature and title of person making
affidavit.)

Subscribed and sworn to before me the — day of
_____, 19—. _____, Notary Public, in and for
County, Texas.

[fol. 329]

Instructions

Amended Form GN—Rev. 8/15/51

1. The Gas Pipe Line Company as the *initial purchaser* of the gas volumes nominated on Form GN is responsible for filing this form.

Whenever the operator of the gas well uses gas for his own operations either on leases or in a fuel system, he will file the Nomination Form.

2. Prepare and file *one copy* of this report. (District 10—two copies)

3. Mail direct to the Commission's Austin Office so as to reach that office *on or before the ninth day of the month prior to the month for which the nomination is made*. Also one copy of the nomination for District 10 shall be sent to the Pampa Office as per memo of April 1, 1950.

4. Make a separate nomination for each Railroad Commission District.

5. Show estimated requirements *from each field* to be produced during the month for which the nomination is made.

6. File a separate report for each kind of Gas (Sweet or Sour or Casinghead)

7. Figures should represent *thousands of cubic feet* (Mcf) of gas at the statutory pressure base of 14.65 pounds per square inch and flowing temperature of 60°F.

8. If any well or wells are disconnected from or any new wells connected to reporting company's Pipe Line, such changes shall be reported to the Commission by letter.

[fol. 330]

*Morning Session**June 30, 1952*

Mr. Looney: In Cause No. 91,332, entitled Panhandle Eastern Pipe Line Company versus Robert S. Calvert, it is stipulated in this case that subsequent to the filing of the original written stipulations herein, which were filed on May 12, 1952, that Panhandle Eastern has paid taxes covering the month of April and May, 1952, during the month of April, 10,989,726 MCF of gas, in the sum of

\$49,453.36; and for the month of May, 1952, 6,945,642 MCF, taxes being in the sum of \$31,255.29, such payments being made to the Comptroller of Public Accounts and having been paid within the time permitted by law and handled subsequently in the same manner as set forth in the original written stipulation, all as set forth in Plaintiff's Third Amended Original Petition filed June 30, 1952.

In all three of said cases the payments were made accompanied by a written protest filed with the State Comptroller, in which the grounds of protest were the same as set forth in the original Stipulation and in Plaintiff's Third Amended Original Petition in each case.

Your Honor, the Plaintiffs in each of these three cases has some additional documentary evidence to offer in each case, and the Plaintiff in each case through their attorneys of record have heretofore advised the attorneys for the Defendants of what the evidence consisted of. We would like to offer in evidence in each of the three cases, to carry the correct exhibit number, being the next succeeding exhibit number after the last one that was introduced on May 12 and 13, first, this Certificate from the Comptroller of Public Accounts.

Mr. Geppert: The Defendants object to the introduction of the document on the ground it is irrelevant and immaterial and doesn't bear on any issue involved in this lawsuit.

The Court: Objection overruled.

Mr. Geppert: Note our exception.

(Said instrument was admitted in evidence as Plaintiff's Exhibit No. "M" and the same is shown herein at Volume I, Page 190.)

Mr. Looney: Next we offer in evidence in each of the three cases another Certificate from the Comptroller of Public Accounts dated June 24, 1952, which we will ask the Reporter to mark temporarily as Plaintiff's Exhibit "B" as of this date and place the appropriate number on it subsequently.

[fol. 332] Mr. Geppert: We make the same objection, just like we did on the exhibit which has been marked temporarily as Plaintiff's Exhibit "A".

The Court: Same ruling. Objection overruled.

Mr. Geppert: Note our exception.

(Said instrument was admitted in evidence as Plaintiff's Exhibit No. "N" and the same is shown herein at Vol. I, Page 191.)

(Thereupon, Court was recessed until 10:00 A.M., July 30, 1952, at which time the following proceedings were had:)

Morning Session

July 30, 1952

Mr. Looney: It is stipulated that the Original Petition was filed January 2, 1952, First Amended Original Petition on March 17, 1952, Second Amended Original Petition on May 12, 1952, Third Amended Original Petition on June 30, 1952, Fourth Amended Original Petition on July 29, 1952, and by agreement all of the evidence and stipulations heretofore offered by all parties are re-offered as of June 30, 1952; and it is further stipulated that Panhandle Eastern Pipe Line Company, for the taxes due in July, 1952, covering the month of June, 1952, paid in the sum of \$48,653.68 prior to July 25, 1952.

Testimony Closed

[fol. 333] PLAINTIFF'S EXHIBIT NO. M

THE STATE OF TEXAS,
County of Travis:

I, Robert S. Calvert, Comptroller of Public Accounts, certify that according to the records of my office:

1. The sum of \$1,761,202.51 collected under authority of Article 6032, V.C.S., was deposited in the State Treasury during the fiscal year ending August 31, 1951.

2. The sum of \$783,710.56 was transferred from the Oil and Gas Enforcement Fund to General Revenue Fund under authority of Article 6032-e, V.C.S., as the unencumbered balance of the 1950-1951 appropriations.

3. The sum of \$237,693.19 was transferred from the Gas Utilities Fund to the General Revenue Fund under authority of Article 6066, V.C.S., as the unencumbered balance of the 1950-1951 appropriations.

Given under my hand and Seal of Office this 20th day of June, A. D., 1952.

(S.) Robert S. Calvert, Comptroller of Public Accounts. (Seal.)

[fol. 334] PLAINTIFF'S EXHIBIT No. N

I, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, do hereby certify that the records of this Department reflect that tax, penalty and interest has been paid provided for by Article 7057f, V.C.S. for the period September 1, 1951 to April 30, 1952 inclusive in the amount of \$7,961,965.89. Of that amount \$4,645,438.72 is in Suspense.

Given under my hand and Seal of Office at Austin, Texas this 24th day of June, 1952.

(S.) Robert S. Calvert, State Comptroller of Public Accounts. (Seal.)

[fol. 335] DEFENDANTS' EXHIBIT No. 2

R. R. C. T. District No. —, Form GN

Railroad Commission of Texas, Oil and Gas Division, Gas Department, Austin, Texas

Amended Form GN—8/15/51

Nomination for the Purchase, or Use of Gas

Company Filing Nomination
 Address
 Date Submitted
 Nomination for Month of
 Kind of Gas Included in This Report (Sweet or Sour) or (Casinghead).

16—198-201

(Follow Instructions on Reverse Side)

<i>Field Name</i>	<i>Producers Name</i>	<i>Total for Month MCF</i>
Total Estimated Requirements for Entire District —		
MCF.		

The above estimated requirements of gas to be produced during the month of _____ will be taken and utilized in accordance with the Laws of the State of Texas, and the Rules, Regulations and Orders of the Railroad Commission of Texas.

STATE OF TEXAS,
County of —:

Before me, the undersigned authority on this day per-
[fol. 336] sonally appeared _____ who, after being by
me duly sworn on oath stated that he represents the report-
ing company in the capacity of _____, and
that said report contains no mis-statements or inaccuracies
within the knowledge of the affiant, and that no pertinent
matter inquired about in this report and within the knowl-
edge of said affiant has been omitted.

_____. (Signature and title of person making
affidavit.)

Subscribed and sworn to before me the — day of
____, 19—. _____, Notary Public in and for
____ County, Texas.

[fol. 337]

Instructions

Amended Form GN—Rev. 8/15/51

1. The Gas Pipe Line Company as the *initial purchaser* of the gas volumes nominated on Form GN is responsible for filing this form.

Whenever the operator of the gas well uses gas for his own operations either on leases or in a fuel system, he will file the nomination form.

2. Prepare and file *one* copy of this report. (District 10—two copies)

3. Mail direct to the Commission's Austin Office so as to

reach that office *on or before the ninth day of the month prior to the month for which the nomination is made*. Also one copy of the nomination for District 10 shall be sent to the Pampa Office as per memo of April 1, 1950.

4. Make a separate nomination for each Railroad Commission District.

5. Show estimated requirements from each field to be produced during the month for which the nomination is made.

6. File a separate report for each kind of gas (Sweet or Sour or Casinghead).

7. Figures should represent *thousands of cubic feet* (Mcf) of gas at the statutory pressure base of 14.65 pounds per square inch and flowing temperature of 60°F.

8. If any well or wells are disconnected from or any new wells connected to reporting company's Pipe Line, such changes shall be reported to the Commission by letter.

[fol. 338] GAS CONTRACT BETWEEN MICHIGAN-WISCONSIN PIPE LINE COMPANY AND PHILLIPS PETROLEUM COMPANY

Dated: December 11, 1945

[fol. 339] This contract, made and entered into this 11th day of December, 1945, by and between Michigan-Wisconsin Pipe Line Company, a Delaware corporation, with an office at Detroit, Michigan, hereinafter referred to as "Buyer", and Phillips Petroleum Company, a Delaware corporation, with an office at Bartlesville, Oklahoma, hereinafter referred to as "Seller", Witnesseth:

Article I

The Project—Initial Procedure

1. Buyer represents that it proposes to construct and operate a gas pipe line system (herein referred to as the Pipe Line) extending from the point of delivery, specified in Article IV, in the Hugoton Gas Field in Hansford County, Texas, in a northeasterly direction to points of connection with distribution systems in Wisconsin and

Michigan, or either of them, and at intermediate points, and that in order to assure a supply of natural gas for the Pipe Line Buyer desires to have dedicated and made available to the Pipe Line gas acreage having underlying commercially recoverable gas reserves as provided in this contract.

2. Seller represents that it owns, or controls by gas purchase contracts, valid and enforceable gas leases on the acreage in the Hugoton Field in Dallam, Sherman and Hansford Counties, Texas, and Texas County, Oklahoma, shown by crosshatching on the map hereto attached, marked Exhibit A, and by this reference made a part hereof, and that the gas leases owned by Seller and those controlled by Seller by gas purchase contracts are separately shown and identified on Exhibit A. Seller also represents that none of such gas leases is subject to any commitment in conflict with this contract, and that Seller is willing, subject to the provisions of this contract and to the reservations [fol. 340] of gas herein provided, to make available to the Pipe Line the gas reserves underlying said acreage.

3. Buyer agrees to proceed with diligence in an endeavor to procure all governmental authority, permits and rights necessary for the construction and operation of the Pipe Line, and upon procuring the same, without the imposition of conditions therein unacceptable to Buyer, to proceed with diligence in the construction of the Pipe Line; provided, however, that Buyer shall not be obligated to commence the construction of the Pipe Line prior to the date when the certificate of public convenience and necessity from the Federal Power Commission is no longer subject to review by the courts. However, upon the happening of any one of the following contingencies, to wit:

(a) the failure of Buyer to procure from the Federal Power Commission, on or before 9/11/46, a certificate of public convenience and necessity for the construction and operation of the Pipe Line, or

(b) the issuance by the Federal Power Commission of an order refusing to grant a certificate of public convenience and necessity for the Pipe Line, or

(c) the failure of Buyer to commence the actual construction of the Pipe Line on or before 10/16/46, or 10/16/46 & 8/9/48, 6/28/49.

Seller shall have the right to terminate this contract by written notice to be delivered to Buyer not later than thirty days after the happening of such contingency.

4. Seller agrees that, upon commencement of construction of the Pipe Line, it will proceed with diligence in the drilling of wells on the acreage covered by its gas leases [fol. 341] and the installation of facilities and will be ready to deliver gas under this contract whenever the Pipe Line is ready to receive the same, and that it will continue the drilling of wells and installation of facilities thereafter with diligence as needed for the performance of this contract. Seller further agrees that it will enforce similar provisions in its gas purchase contracts covered by this contract. However, upon the happening of any of the following contingencies, to wit:

(a) the failure of the Federal Power Commission, after the exercise of due diligence by Buyer, to grant prior to January 1, 1947, a certificate of public convenience and necessity to Buyer for the construction and operation of the Pipe Line, or

(b) the issuance by the Federal Power Commission of an order refusing to grant a certificate of public convenience and necessity for the Pipe Line or granting such certificate with conditions or restrictions which are unacceptable to Buyer, or

(c) the failure of Seller to commence the drilling of wells and the installation of facilities for the delivery of gas hereunder within thirty days after Buyer shall have commenced the actual construction of the Pipe Line, or

(d) the failure of Seller to complete its facilities in readiness to deliver gas hereunder not later than the day on which Buyer shall have completed the Pipe Line in readiness to receive gas hereunder,

Buyer shall have the right to terminate this contract by written notice delivered to Seller not later than thirty days after the happening of such contingency.

5. The right of Seller or Buyer, as the case may be, to terminate this contract upon the happening of any of the contingencies described in Sections 3 and 4 of this Article

I shall not exclude any rights and remedies such party [fol. 342] may have by reason of the other party's failure to proceed with diligence as above provided.

Article II

Availability of Gas

1. The term "gas" as used in this contract means natural gas produced from gas wells and does not include casinghead gas. The term "gas lease" as used in this contract means all rights in respect of gas produced from gas wells on acreage covered by gas leases or oil and gas leases or owned in fee, but does not include any rights in respect of crude oil or casinghead gas. The term "casinghead gas" as used above means gas produced from oil wells together with the crude oil and from the same formation or formations from which the crude oil is produced.

2. Seller represents that all the gas leases covered by this contract are for terms of stated periods of years and as long thereafter as oil or gas is produced in paying quantities from the lands covered thereby and that said leases entitle the respective lessees to sell or dispose of all gas produced from the lands covered thereby, except in some cases gas reserved by the lessor for domestic use on the premises. Seller further represents that the acreage identified on Exhibit A as "Phillips Leased Acreage" is covered by gas leases owned by Seller and that the acreage identified on Exhibit A as "Phillips Contracted Acreage" is covered by valid and enforceable gas purchase contracts between various producers as sellers and Seller herein as buyer, a copy of each of which is hereto attached, marked Exhibit B, and by this reference made a part hereof. Subject to the possibility of termination of this contract as herein provided, Seller hereby dedicates to the Pipe Line and agrees to sell and deliver to Buyer all gas produced and saved from the acreage covered by this contract and [fol. 343] shown on Exhibit A, excepting and reserving, however, the following volumes of gas: (1) all volumes of gas produced from any depths below sea level, (2) all volumes of gas used for the development and operation of the leases for the production of gas from depths above sea level and all volumes of gas reserved by the lessors for

domestic purposes, (3) all volumes of gas lost by shrinkage due to removal from the gas of such products as Seller is required or entitled to remove under the terms of this contract, (4) all volumes of gas used for the operation of Seller's processing plant or plants in which the gas delivered hereunder is processed and for the operation of facilities used for the delivery of the gas hereunder to Buyer, and (5) all other volumes of gas reserved by the terms of the gas purchase contracts set forth in Exhibit B.

3. Until Buyer shall have commenced acceptance hereunder of the minimum volumes of gas to be purchased by it as provided in Article III, Seller and the respective sellers under the gas purchase contracts shall have the right to produce from the lands covered by their respective gas leases and to use or sell to others than Buyer such volumes of gas as shall, in their respective judgments, be necessary to be produced to keep the gas leases in force and prevent drainage of gas from the acreage covered by this contract by wells owned by other operators. If any gas shall be so produced, Seller agrees that it will keep or cause to be kept accurate account thereof and furnish Buyer in writing such information with respect thereto as Buyer shall reasonably request.

4. In respect of the gas leases owned by Seller and covered by this contract, Seller agrees to pay all delay rentals necessary to keep such gas leases in good standing and to continue the development of such gas leases as needed for the performance of this contract, but Seller shall not be required to drill more than one well to each six hundred [fol. 344] forty acres, nor to drill any wells which would not be drilled by a reasonably prudent operator under similar circumstances. Seller shall not be required to retain by payment of delay rentals acreage which, in its judgment, has been condemned by development, nor to retain any producing acreage which can no longer be operated at a profit, but before releasing any gas lease on any such acreage, Seller shall give Buyer timely notice that it proposes to release the same and, upon demand by Buyer, assign to Buyer such gas lease, upon payment by Buyer to Seller of the salvage value of any casing and other equipment of Seller in any well or wells located on the acreage covered

thereby. Except as otherwise specifically provided in this contract, Seller agrees to keep the gas purchase contracts in full force and effect and to assert and defend, for Buyer's benefit, all of Seller's rights thereunder, and agrees that any gas leases assigned to Seller as a result of the provisions contained in said gas purchase contracts shall become subject to the provisions of this contract to the same extent as Seller's gas leases. In the event Buyer shall, pursuant to the foregoing provisions, acquire any gas leases, Buyer shall have the right to take into the Pipe Line gas produced from the acreage covered by such leases and the maximum and minimum volumes specified in Sections 2 and 3 of Article III and all of Buyer's requirements as defined in Section 6 of Article III shall be reduced in like amount. In the event of any Seller's gas leases covering acreage lying within the area bounded by Line A shown on Exhibit A or any of the gas leases covered by the gas purchase contracts covering acreage lying within said area shall terminate and shall not be acquired by Buyer after timely notice and opportunity to acquire as provided in this Section 4, and in the event Seller shall not, within six months after such termination, substitute therefor gas leases having no commitment in conflict with this contract and covering other [fol. 345] acreage having underlying gas reserves and potential capacity to deliver gas at least equal to the underlying gas reserves and potential capacity to deliver gas of the acreage covered by such terminated gas leases, determined in the same manner as provided in Section 5 of this Article II, the maximum and minimum volumes specified in Sections 2 and 3 of Article III and all of Buyer's requirements as defined in Section 6 of Article III shall be reduced in the proportion that the acreage covered by such terminated leases bears to the total acreage covered by this contract and lying within said area.

5. It is understood that for the purpose of consolidating acreage subject to this contract Seller shall have the right to exchange any acreage subject to this contract for other acreage having no commitment in conflict with this contract and having underlying gas reserves and potential capacity to deliver gas at least equal to the underlying gas reserves and potential capacity to deliver gas of the acreage for which it is exchanged; provided, however, that no such

exchange shall be made which will prevent Seller from furnishing gas to Buyer in accordance with the other provisions of this contract or diminish the amount of the gas reserves available to Buyer under this contract immediately prior to such exchange. In the event any acreage substituted in such exchange for acreage covered by this contract shall be acreage controlled by Seller by gas purchase contract, such gas purchase contract or contracts shall contain terms substantially equivalent to the terms of the gas purchase contracts in Exhibit B. Before making any such exchange, Seller shall notify Buyer and, in the event the parties hereto shall be unable to agree concerning the volumes of the underlying gas reserves and the potential capacity to deliver gas of the acreages to be so exchanged, the determination of the volumes of such reserves and the potential capacity to deliver gas shall be [fol. 346] made by an engineering firm to be selected by Seller from a list of three engineering firms to be designated by Buyer, who shall be firms of high standing in their profession and experienced in the computation of gas reserves, and the determination made by such engineering firm shall be binding upon both parties hereto. The fee of such engineering firm shall be borne by Seller. Upon such exchange, the gas leases and gas purchase contracts, or either the gas leases or gas purchase contracts, covering acreage covered by this contract and so exchanged shall be released from all provisions of this contract and the gas leases and gas purchase contracts, or either the gas leases or gas purchase contracts, covering the acreage substituted therefor shall become subject to all the provisions of this contract.

6. Except as provided in Section 5 of Article III, Seller shall have the right at any time to deliver gas hereunder from any source or sources other than acreage covered by this contract and, in the event it shall do so, Seller shall have the right to produce or purchase from acreage covered by this contract equal volumes of gas and to use such gas or sell the same to others than Buyer. In such case the volumes of gas supplied from other sources and the volumes of gas produced from the acreage covered by this contract and so used or sold by Seller shall be carefully measured and, upon request by Buyer, Seller shall furnish to Buyer for examination all meter charts and pertinent data evi-

dencing such volumes, use and sales. Buyer shall have access to the meters used to measure such gas to the same extent as meters used to measure gas delivered hereunder.

7. When, in order to deliver hereunder the maximum volumes of gas which Buyer is entitled to receive hereunder, it is necessary that the wells on the acreage covered by this contract be operated so that they produce the maximum volumes that may be legally produced therefrom, and if in order to produce from such wells such maximum volume [fol. 347] it is necessary to maintain an average working pressure on such wells of not to exceed forty pounds per square inch gauge, Seller shall, if it has not previously done so, install and shall operate the requisite facilities to do so, but Seller shall not be obligated to maintain an average working pressure on the wells on the acreage covered by this contract of less than forty pounds per square inch gauge.

8. It is specifically understood and agreed by the parties hereto that the volumes of gas that Seller shall be obligated to deliver to Buyer under the terms of this contract shall be limited to the volumes of gas which can be legally produced from the acreage covered by this contract less the volumes of gas excepted and reserved as provided in this contract.

9. In the event any law or any rule or regulation of any state or Federal authority having jurisdiction shall require Buyer to purchase a portion of all of its requirements of gas from other than Seller or shall make it necessary for Buyer to do so in order to obtain all of its requirements of gas, the maximum and minimum volumes specified in Sections 2 and 3 of Article III and all of Buyer's requirements as defined in Section 6 of Article III shall be reduced by a volume equal to such volume of gas as Buyer is so required to purchase during the time that Buyer shall be so required, and Seller shall have the right, concurrently with such purchases by Buyer, to use or sell to others than Buyer like volumes of gas produced from the acreage covered by this contract.

[fol. 348]

Article IV

Delivery Point

The point of delivery for all gas delivered hereunder shall be at the outlet of the meter station to be installed and operated by Seller at a location to be selected by Seller on or before March 1, 1946, within one mile of the southwest corner of Section 8, Block 1, Public Free School Land Survey, Hansford County, Texas. Upon selecting such location, Seller shall promptly advise Buyer thereof in writing.

Article V

Pressure

All gas sold and purchased hereunder shall be delivered at the delivery point above specified at the pressure available in Seller's facilities, but not less than two hundred pounds per square inch gauge.

[fol. 349]

Article VI

Quality

1. All gas delivered by Seller under the terms of this contract shall conform to the following specifications:

(a) Odors and Solids. The gas shall be commercially free from objectionable odors, solid matter, dust, gums and gum-forming constituents which might interfere with its merchantability or cause injury to or interference with proper operation of the lines, regulators, meters or other appliances through which it flows.

(b) Oxygen. The gas shall not at any time have an oxygen content in excess of one per cent by volume, and Seller shall make every reasonable effort to keep the gas free of oxygen.

(c) Liquids. The gas shall be free of water and hydrocarbons in liquid form.

(d) Hydrogen Sulphide. The gas shall not contain more than one grain of hydrogen sulphide per one hundred cubic feet.

(e) Total Sulphur. The gas shall not contain more than twenty grains of total sulphur (hydrogen sulphide and mercaptan sulphur) per one hundred cubic feet.

(f) Heating Value. The gas shall have a total heating value per cubic foot of not less than nine hundred seventy nor more than one thousand twenty British thermal units, the term "total heating value per cubic foot" meaning the number of British thermal units produced by the combustion, at constant pressure, of the amount of gas free from water vapor which would occupy a volume of one cubic foot at a temperature of sixty degrees Fahrenheit and under a pressure equivalent to that of thirty inches of mercury at thirty-two degrees Fahrenheit and under the standard gravitational force (the acceleration 980.665 c.m. per sec.) with air of the same temperature and pressure as the [fol. 350] gas, when the products of combustion are cooled to the initial temperature of gas and air and when the water formed by combustion is condensed to the liquid state. If the gas tendered for delivery by Seller to Buyer under this contract shall have a total heating value per cubic foot of less than nine hundred seventy British thermal units, Seller shall at its own expense take such steps as shall be necessary to supply the deficiency in British thermal units.

2. Within the limits of the minimum heating value specification above, Seller shall have the right to remove from the gas delivered hereunder any constituents thereof other than methane, and shall have the right to remove such methane as is necessarily removed from the gas in the process of removing other constituents.

Article VII

Natural Gasoline Plant

In order to meet the exigencies of Seller's operating conditions, it is agreed that Seller shall, at its option, have the right to install its natural gasoline plant, for the extraction of hydrocarbons from the gas delivered hereunder, on the Pipe Line downstream from Buyer's initial compressor station which will be located at or near the de-

livery point above specified. Not more than six months nor less than four months prior to the anticipated date of commencement of construction of the Pipe Line, Buyer shall notify Seller of such date, and Seller shall within thirty days thereafter notify Buyer of the date of Seller's election as to the location of such natural gasoline plant. In the event such plant shall be located downstream from Buyer's said initial compressor station,

(a) The specifications in Appendix A in respect of Odors and Solids, Oxygen, Free Sulphide and [fol. 351] Total Sulphur shall be applicable to the gas at the delivery point above specified. The specifications in respect of Liquids and Heat Value shall be applicable to the gas at the discharge of Seller's said natural gasoline plant.

(b) Seller shall install and maintain metering equipment in such manner as to measure the volume of gas lost by shrinkage in the natural gasoline plant and Buyer's initial compressor station and the volume of gas lost by extraction of hydrocarbons, and the volume of gas, if any, taken from the Pipe Line and used as fuel in said natural gasoline plant. Seller shall also install and maintain all devices and equipment reasonably necessary to control, and insofar as possible eliminate, conditions affecting the accuracy of such metering equipment. Seller shall from time to time consult with Buyer with respect to the type, design and efficiency of such devices and equipment.

(c) In computing the volume of gas to be delivered by Buyer hereunder, the volume of gas lost by shrinkage in the natural gasoline plant and Buyer's initial compressor station due to extraction of hydrocarbons, and the volume of gas, if any, taken from the Pipe Line and used as fuel in said natural gasoline plant shall be deducted from the total volume of gas delivered to Buyer at the delivery point above specified.

(d) Such natural gasoline plant and the appurtenant equipment installed by Seller shall be designed, constructed and operated to receive the gas after the same shall have passed through Buyer's initial compressor station, at the operating pressure on the Pipe

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from the Pipe Line and used as fuel in said
natural gasoline plant, Seller agrees to pay to Buyer
one cent per one thousand cubic feet of the volume of
gas lost by shrinkage in the natural gasoline plant and
said compressor station due to extraction of hydro-
carbons and the volume of gas, if any, taken from the
Pipe Line and used as fuel in said natural gasoline
plant, all such volumes to be determined as above pro-
vided. The sums due from Seller to Buyer each month
under the terms of this subsection (e) shall be de-
ducted from the statement from Seller to Buyer for
gas purchased during such month.

(f) Seller shall be entitled to all hydrocarbons re-
moved from the gas through the operation of Buyer's
compressor station.

Seller shall indemnify Buyer and hold it harm-
less and free of any cost or liability due to
the construction, maintenance or operation of Seller's
said natural gasoline plant and appurtenant facilities
and the loss of, the handling or loss of, the
gas from the time it is received by Seller at the dis-
charge of the natural compressor station until it
is returned to the facilities.

[fol. 353]

Article IX

Taxes

Seller shall pay all property taxes on its leases and facilities and all present gross production taxes, severance taxes and other excise taxes upon or in respect of the gas delivered hereunder up to the point of delivery of the gas to Buyer. All increases in such present gross production taxes, severance taxes and excise taxes upon or in respect of the gas delivered hereunder or the production, transportation or handling thereof up to the point of delivery of the gas to Buyer required to be paid by Seller or by the sellers under the gas purchase contracts shall be borne one-fourth by Seller or by such sellers, as the case may be, and three-fourths by Buyer. Excise taxes as used in this paragraph shall not include any taxes based on income, profits or the right to exercise the corporate franchises of Seller or the sellers under the gas purchase contracts, all of which and all increases of which shall be paid by Seller or the sellers under the gas purchase contracts.

[fol. 354]

Article XIV

Estimates of Requirements

In order to enable Seller to conduct its operations properly, Buyer shall notify Seller each month of its estimates of requirements of gas during each of the following six months, which estimates shall not be inconsistent with the provisions of this contract. Buyer shall use its best judgment and experience in arriving at such estimates, but shall not be bound by the quantities thereof.

[fol. 355]

Article XVII

Term

Unless terminated prior to delivery of gas hereunder as provided in Article I hereof, this agreement shall remain in force and effect from the date hereof and thereafter as long as gas shall be produced from the acreage covered by the gas leases and gas purchase contracts covered by this contract in paying quantities from depths above sea level, or

until the amount of gas available to Buyer hereunder shall be so reduced that further operation of the Pipe Line shall, in Buyer's judgment, no longer be profitable to Buyer and such operation shall be discontinued.

Article XVIII

Miscellaneous

1. No waiver by either party of any one or more defaults by the other in the performance of any of the provisions of this contract shall operate or be construed as a waiver of any other or further default or defaults, whether of a like or of a different character.

[fol. 356] 2. On request of Buyer, Seller shall furnish Buyer in writing with such information as Seller may possess with respect to the gas wells located on the acreage covered by this contract, their production history, their capacity to produce, pressures, flow characteristics, and any other information relating to the wells or to the acreage covered by this contract which Buyer may reasonably specify.

3. Except as herein otherwise provided, any notice, request, demand, statement or bill provided for in this contract, or any notice which either party may desire to give to the other, shall be in writing and shall be considered as duly delivered when mailed by registered mail to the post office address of either of the parties hereto, as the case may be, as follows:

Seller: Phillips Petroleum Company, Bartlesville, Oklahoma

Buyer: Michigan-Wisconsin Pipe Line Company, 415 Clifford Street, Detroit, Michigan

or at such other address as either party shall designate by formal written notice. Routine communications, including monthly statements and payments, shall be considered as duly delivered when mailed by either registered or ordinary mail.

4. Each party shall have the right to examine at reasonable times the books, records and charts of the other

party to the extent necessary to verify the accuracy of any statement, charge, computation or demand made under or pursuant to any of the provisions of this contract.

5. Except as provided in Article VII, Seller shall be deemed to be in control and possession of the gas deliverable hereunder and responsible for any damage or injury caused thereby until the same shall have been delivered to Buyer at the point of delivery, after which delivery Buyer [fol. 357] shall be deemed to be in exclusive control and possession of the gas and responsible for any injury or damage caused thereby.

6. The term "day" as used herein shall mean a period of twenty-four consecutive hours beginning and ending at seven o'clock A. M. Central Standard Time or such other standard time as shall be in effect at the point of delivery hereinabove specified.

7. This contract and the respective obligations of the parties hereunder are subject to present and future valid laws and valid orders, rules and regulations of duly constituted authorities having jurisdiction.

8. The terms and provisions hereof shall extend to and be binding upon the parties hereto, their assigns and successors in interest.

In Witness Whereof, Michigan-Wisconsin Pipe Line Company has caused its name to be hereunto subscribed by its president or a vice president thereunto duly authorized and its corporate seal to be affixed and attested by its secretary or an assistant secretary, and Phillips Petroleum Company has caused its name to be hereunto subscribed by its agent thereunto duly authorized, on the date first above set forth.

Michigan-Wisconsin Pipe Line Company, (Signed)
by Frank L. Conrad, President. (Corporate Seal.)

Attest: (Signed) W. I. Brown, Assistant Secretary; Phillips Petroleum Company, (Signed) by A. M. Rippel, Agent.

[fol. 358] IN THE COURT OF CIVIL APPEALS FOR THE THIRD
SUPREME JUDICIAL DISTRICT OF TEXAS

No. 10,117

ROBERT S. CALVERT, et al., Appellants,

v.

MICHIGAN-WISCONSIN PIPE LINE COMPANY, Appellee

PETITION FOR APPEAL—Filed June 25, 1953

Considering itself aggrieved by the final decree and judgment of this Court entered February 4, 1953, following which this Court denied appellee's motion for rehearing and the Supreme Court of Texas refused appellee's application for writ of error and denied its motion for rehearing of such refusal, Michigan-Wisconsin Pipe Line Company, appellee herein, does hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and from each and every part thereof; that said judgment be stayed pending final disposition of this appeal; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said appellee; and that the material parts of the record, proceedings and papers upon which said final judgment and decree was based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such cases made and provided.

Respectfully submitted, D. H. Culton, Everett L.
Looney, R. Dean Moorhead, Arthur R. Seder, Jr.,
S. A. L. Morgan, Counsel for Appellee.

[File endorsement omitted.]

[fol. 359] IN THE COURT OF CIVIL APPEALS FOR THE THIRD
SUPREME JUDICIAL DISTRICT OF TEXAS

No. 10,117

ROBERT S. CALVERT, et al., Appellants,

v.

MICHIGAN-WISCONSIN PIPE LINE COMPANY, Appellee

ORDER ALLOWING APPEAL—JUNE 25, 1953

Michigan-Wisconsin Pipe Line Company having filed its petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this Court entered on February 4, 1953, and from each and every part thereof, and having presented its assignment of error and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of \$250.00, with good and sufficient surety, and shall be conditioned as may be required by law, and that the judgment be suspended and stayed until the termination of this appeal.

It is further ordered that citation shall issue in accordance with law.

Roy C. Archer, Chief Justice.

Dated: June 25th, 1953.

[fol. 360] Citation in usual form showing service on W. V. Geppert—omitted in printing.

[fol. 361] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. —

MICHIGAN-WISCONSIN PIPE LINE COMPANY, Appellant,

v.

ROBERT S. CALVERT, et al., Appellees

ASSIGNMENT OF ERROR AND PRAYER FOR REVERSAL—
Filed June 25, 1953

Michigan-Wisconsin Pipe Line Company, appellant in the above entitled cause, in connection with its appeal to the Supreme Court of the United States, hereby files the following assignment of error upon which it will rely in its prosecution of said appeal from the final judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas entered on February 4, 1953:

The Court of Civil Appeals erred in holding that Section XXIII of H.B. 285, Acts of the 52nd Legislature of Texas, is valid under the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States, as applied to appellant's activities in taking possession of gas for the purpose of immediate transportation of such gas in interstate commerce, and in reversing the judgment of the district court.

Wherefore, appellant Michigan-Wisconsin Pipe Line Company prays that the final judgment of the Court of Civil Appeals be reversed, and for such other relief as the Court may deem fit and proper.

D. H. Culton, Everett L. Looney, R. Dean Moorhead,
Arthur R. Seder, Jr., S. A. L. Morgan, Counsel for
Appellant.

[File endorsement omitted.]

[fol. 362] IN THE SUPREME COURT OF TEXAS

No. A-4089

MICHIGAN-WISCONSIN PIPE LINE COMPANY, Petitioner,

v.

ROBERT S. CALVERT, et al., Respondents

PETITION FOR APPEAL—Filed June 25, 1953

Considering itself aggrieved by the final decree and judgment of this Court entered May 6, 1953, following which this Court denied its motion for rehearing, Michigan-Wisconsin Pipe Line Company, Petitioner herein, does hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and from each and every part thereof; that said judgment be stayed pending final disposition of this appeal; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said Petitioner; and that the material parts of the record, proceedings and papers upon which said final judgment and decree was based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such cases made and provided.

Respectfully submitted, D. H. Culton, Everett L. Looney, R. Dean Moorhead, Arthur R. Seder, Jr.,
S. A. L. Morgan, Counsel for Petitioner.

[File endorsement omitted.]

[fol. 363]

[File endorsement omitted]

IN THE SUPREME COURT OF TEXAS

No. A-4089

MICHIGAN-WISCONSIN PIPE LINE COMPANY, Petitioner,

v.

ROBERT S. CALVERT, et al., Respondents

ORDER ALLOWING APPEAL—June 25, 1953

Michigan-Wisconsin Pipe Line Company having filed its petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this Court entered on May 6, 1953, and from each and every part thereof, and having presented its assignment of error and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of \$250.00, with good and sufficient surety, and shall be conditioned as may be required by law, and that the judgment be suspended and stayed until the termination of this appeal; and that the Clerk of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, to whom the record has been remitted, return the record to the Clerk of this Court, who, upon receipt of such record, is directed to prepare and forward to the Clerk of the Supreme Court of the United States a copy of such portions of the record as shall be designated by the parties.

[fol. 364] It is further ordered that citation shall issue in accordance with law.

J. E. Hickman, Chief Justice.

Dated: June 25, 1953.

[fol. 365] Citation in usual form showing service on W. V. Geppert, omitted in printing.

[fol. 366] [File endosement omitted]

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1953

No. —

MICHIGAN-WISCONSIN PIPE LINE COMPANY, Appellant,

v.

ROBERT S. CALVERT, et al., Appellees

ASSIGNMENT OF ERROR AND PRAYER FOR REVERSAL—Filed
June 25, 1953

Michigan-Wisconsin Pipe Line Company, appellant in the above entitled cause, in connection with its appeal to the Supreme Court of the United States, hereby files the following assignment of error upon which it will rely in its prosecution of said appeal from the final judgment of the Supreme Court of Texas entered on May 6, 1953:

The Supreme Court of Texas erred in sustaining the holding of the Court of Civil Appeals for the Third Supreme Judicial District of Texas that Section XXIII of H. B. 285, Acts of the 52nd Legislature of Texas, is valid under the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States, as applied to appellant's activities in taking possession of gas for the purpose of immediate transportation of such gas in interstate commerce, and reversing the judgment of the district court.

Wherefore, appellant Michigan-Wisconsin Pipe Line Company prays that the final judgment of the Supreme Court of Texas sustaining the judgment of the Court of Civil Appeals be reversed, and for such other relief as the Court may deem fit and proper.

D. H. Culton, Everett L. Looney, R. Dean Moorhead,
Arthur R. Seder, Jr., S. A. L. Morgan, Counsel for
Appellant.

[fol. 367] IN THE COURT OF CIVIL APPEALS FOR THE THIRD
SUPREME JUDICIAL DISTRICT OF TEXAS

No. 10,116

ROBERT S. CALVERT, et al., Appellants,

v.

PANHANDLE EASTERN PIPE LINE COMPANY, Appellee

PETITION FOR APPEAL—Filed June 25, 1953

Considering itself aggrieved by the final decree and judgment of this Court entered February 4, 1953, following which this Court denied appellee's motion for rehearing and the Supreme Court of Texas refused appellee's application for writ of error and denied its motion for rehearing of such refusal, Panhandle Eastern Pipe Line Company, appellee herein, does hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and from each and every part thereof; that said judgment be stayed pending final disposition of this appeal; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said appellee; and that the material parts of the record, proceedings and papers upon which said final judgment and decree was based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such cases made and provided.

Respectfully submitted, D. H. Culton, Everett L.
Looney, R. Dean Moorhead, Edward H. Lange,
Gene Woodfin, Counsel for Appellee.

[File endorsement omitted.]

[fol. 368] IN THE COURT OF CIVIL APPEALS FOR THE THIRD
SUPREME JUDICIAL DISTRICT OF TEXAS

No. 10,116

ROBERT S. CALVERT, et al., Appellants,

v.

PANHANDLE EASTERN PIPE LINE COMPANY, Appellee

ORDER ALLOWING APPEAL—June 25, 1953

Panhandle Eastern Pipe Line Company having filed its petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this Court entered on February 4, 1953, and from each and every part thereof, and having presented its assignment of error and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of \$250.00, with good and sufficient surety, and shall be conditioned as may be required by law, and that the judgment be suspended and stayed until the termination of this appeal.

It is further ordered that citation shall issue in accordance with law.

Roy C. Archer, Chief Justice.

Dated: June 25th, 1953.

[File endorsement omitted.]

[fol. 369] Citation in usual form showing service on W. V. Geppert, omitted in printing.

[fol. 370] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. —

PANHANDLE EASTERN PIPE LINE COMPANY, Appellant,

v.

ROBERT S. CALVERT, et al., Appellees

ASSIGNMENT OF ERROR AND PRAYER FOR REVERSAL—Filed
June 25, 1953

Panhandle Eastern Pipe Line Company, appellant in the above entitled cause, in connection with its appeal to the Supreme Court of the United States, hereby files the following assignment of error upon which it will rely in its prosecution of said appeal from the final judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas entered on February 4, 1953:

The Court of Civil Appeals erred in holding that Section XXIII of H.B. 285, Acts of the 52nd Legislature of Texas, is valid under the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States, as applied to appellant's activities in taking possession of gas for the purpose of immediate transportation of such gas in interstate commerce, and in reversing the judgment of the district court.

Wherefore, appellant Panhandle Eastern Pipe Line Company prays that the final judgment of the Court of Civil Appeals be reversed, and for such other relief as the Court may deem fit and proper.

D. H. Culton, Everett L. Looney, R. Dean Moorhead,
Edward H. Lange, Gene Woodfin, Counsel for
Appellant.

[File endorsement omitted.]

[fol. 371] IN THE SUPREME COURT OF TEXAS

No. A-4088

PANHANDLE EASTERN PIPE LINE COMPANY, Petitioner,

v.

ROBERT S. CALVERT, et al., Respondents

PETITION FOR APPEAL—Filed June 25, 1953

Considering itself aggrieved by the final decree and judgment of this Court entered May 6, 1953, following which this Court denied its motion for rehearing, Panhandle Eastern Pipe Line Company, Petitioner herein, does hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and from each and every part thereof; that said judgment be stayed pending final disposition of this appeal; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said Petitioner; and that the material parts of the record, proceedings and papers upon which said final judgment and decree was based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such cases made and provided.

Respectfully submitted, D. H. Culton, Everett L. Looney, R. Dean Moorhead, Edward H. Lange, Gene Woodfin, Counsel for Petitioner.

[File endorsement omitted.]

[fol. 372] IN THE SUPREME COURT OF TEXAS

No. A-4088

PANHANDLE EASTERN PIPE LINE COMPANY, Petitioner,

v.

ROBERT S. CALVERT, et al., Respondents

ORDER ALLOWING APPEAL—June 25, 1953

Panhandle Eastern Pipe Line Company having filed its petition praying for an appeal to the Supreme

Court of the United States from the final judgment and decree of this Court entered on May 6, 1953, and from each and every part thereof, and having presented its assignment of error and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided.

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of \$250.00, with good and sufficient surety, and shall be conditioned as may be required by law, and that the judgment be suspended and stayed until the termination of this appeal; and that the Clerk of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, to whom the record has been remitted, return the record to the Clerk of this Court, who, upon receipt of such record, is directed to prepare and forward to the Clerk of the Supreme Court of the United States a copy of such portions of the record as shall be designated by the parties.

[fol. 373] It is further ordered that citation shall issue in accordance with law.

J. E. Hickman, Chief Justice.

Dated: June 25, 1953.

[fol. 374] Citation in usual form showing service on W. V. Geppert, omitted in printing.

[fol. 375] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. —

PANHANDLE EASTERN PIPE LINE COMPANY, Appellant,

v.

ROBERT S. CALVERT, et al., Appellees

ASSIGNMENT OF ERROR AND PRAYER FOR REVERSAL—Filed
June 25, 1953

Panhandle Eastern Pipe Line Company, appellant in the above entitled cause, in connection with its appeal to the Supreme Court of the United States, hereby files the following assignment of error upon which it will rely in its prosecution of said appeal from the final judgment of the Supreme Court of Texas entered on May 6, 1953:

The Supreme Court of Texas erred in sustaining the holding of the Court of Civil Appeals for the Third Supreme Judicial District of Texas that Section XXIII of H.B. 285, Acts of the 52nd Legislature of Texas, is valid under the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States, as applied to appellant's activities in taking possession of gas for the purpose of immediate transportation of such gas in interstate commerce, and reversing the judgment of the district court.

Wherefore, appellant Panhandle Eastern Pipe Line Company prays that the final judgment of the Supreme Court of Texas sustaining the judgment of the Court of Civil Appeals be reversed, and for such other relief as the Court may deem fit and proper.

D. H. Culton, Everett L. Looney, R. Dean Moorhead, Edward H. Lange, Gene Woodfin, Counsel
for Appellant.

[fol. 376] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. 198

MICHIGAN-WISCONSIN PIPE LINE COMPANY, Appellant,

v.

ROBERT S. CALVERT, et al., Appellees

Appeal from the Court of Civil Appeals for the Third
Supreme Judicial District of Texas, at Austin, Texas

STATEMENT OF POINT TO BE RELIED UPON—Filed July 25,
1953

To the Clerk of the Supreme Court of the United States:

1. Appellant adopts for its statement of the point upon which it intends to rely in its appeal to this Court the point contained in its Assignment of Error heretofore filed.

D. H. Culton, Everett L. Looney, R. Dean Moorhead, A. R. Seder, Jr., S. A. L. Morgan, Counsel for Appellant.

Dated: June 25, 1953.

[fols. 377-378] IN THE SUPREME COURT OF THE UNITED
STATES, OCTOBER TERM, 1953

No. 199

MICHIGAN-WISCONSIN PIPE LINE COMPANY, Appellant,

v.

ROBERT S. CALVERT, et al., Appellees

Appeal from the Supreme Court of Texas

STATEMENT OF POINT TO BE RELIED UPON—Filed July 23,
1953

To the Clerk of the Supreme Court of the United States:

1. Appellant adopts for its statement of the point upon which it intends to rely in its appeal to this Court the point contained in its Assignment of Error heretofore filed.

D. H. Culton, Everett L. Looney, R. Dean Moorhead,
A. R. Seder, Jr., S. A. L. Morgan, Counsel for Ap-
pellant

Dated: June 30, 1953.

[fols. 379-380] IN THE SUPREME COURT OF THE UNITED
STATES, OCTOBER TERM, 1953

No. 200

PANHANDLE EASTERN PIPE LINE COMPANY, Appellant

v.

ROBERT S. CALVERT, et al., Appellees

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD
SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN, TEXAS

STATEMENT OF POINT TO BE RELIED UPON—Filed

July 23, 1953

To the Clerk of the Supreme Court of the United States:

1. Appellant adopts for its statement of the point upon which it intends to rely in its appeal to this Court the point contained in its Assignment of Error heretofore filed.

D. H. Culton, Everett L. Looney, R. Dean Moorhead,
Edward H. Lange, Gene M. Woodfin, Counsel for
Appellant

Dated: June 25, 1953.

[fols. 381-382] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. 201

PANHANDLE EASTERN PIPE LINE COMPANY, Appellant

v.

ROBERT S. CALVERT, et al., Appellees

Appeal from the Supreme Court of Texas

STATEMENT OF POINT TO BE RELIED UPON—Filed
July 23, 1953

To the Clerk of the Supreme Court of the United States:

1. Appellant adopts for its statement of the point upon which it intends to rely in its appeal to this Court the point contained in its Assignment of Error heretofore filed.

D. H. Culton, Everett L. Looney, R. Dean Moorhead,
Edward H. Lange, Gene M. Woodfin, Counsel for
Appellant

Dated: June 30, 1953.

[fols. 383-384] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

Nos. 198, 199, 200 & 201

MICHIGAN-WISCONSIN PIPE LINE COMPANY, Appellant,

vs.

ROBERT S. CALVERT, Comptroller of Public Accounts, et al.;
MICHIGAN-WISCONSIN PIPE LINE COMPANY, Appellant,

vs.

ROBERT S. CALVERT, Comptroller of Public Accounts, et al.;
PANHANDLE EASTERN PIPE LINE COMPANY, Appellant,

vs.

ROBERT S. CALVERT, Comptroller of Public Accounts, et al.;
and

PANHANDLE EASTERN PIPE LINE COMPANY, Appellant,

vs.

ROBERT S. CALVERT, Comptroller of Public Accounts, et al.

ORDER ON JURISDICTION—October 12, 1953

The statements of jurisdiction and motions to dismiss or affirm in these cases having been submitted and considered by the Court, further consideration of the motions to dismiss or affirm and of the jurisdiction of this Court is postponed to the hearing of the cases on the merits. The cases are consolidated for argument and assigned for hearing immediately following No. 163, Railway Express Agency, Inc. vs. Commonwealth of Virginia. One hour is allowed each side for oral argument.

October 12, 1953.

The Chief Justice took no part in the consideration or decision of this question.

[fol. 385] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1953

Nos. 198-201

MICHIGAN-WISCONSIN PIPE LINE COMPANY, Appellant,

vs.

ROBERT S. CALVERT, et al., Appellees

PANHANDLE EASTERN PIPE LINE COMPANY, Appellant,

vs.

ROBERT S. CALVERT, et al., Appellees

Appeals By Each Appellant from Both the Supreme Court
of Texas and the Court of Civil Appeals for the Third
Supreme Judicial District of Texas

STIPULATION RELATIVE TO THE PRINTING OF THE RECORDS—
Filed Nov. 2, 1953

[fol. 386] To the Honorable Supreme Court of the United
States

All parties in the above-captioned four appeals, acting by
their attorneys of record, hereby agree and stipulate that
there shall be only a single printed record in these appeals,
and that such printed record shall consist of the following
instruments:

- (1) Plaintiff's Fourth Amended Original Petition, from
the record in Cause No. 198.
- (2) Defendants' First Amended Original Answer, from
the record in Cause No. 198.
- (3) Plaintiff's Fourth Amended Original Petition, from
the record in Cause No. 200.
- (4) Defendants' First Amended Original Answer, from
the record in Cause No. 200.
- (5) Judgment of the 126th District Court of Travis
County, from the record in Cause No. 198.

(6) Judgment of the 126th District Court of Travis County, from the record in Cause No. 200.

(7) Opinion of the Court of Civil Appeals, from the record in Cause No. 198.

(8) Judgment of the Court of Civil Appeals, from the record in Cause No. 198.

[fol. 387] (9) Judgment of the Court of Civil Appeals, from the record in Cause No. 200.

(10) Application for Writ of Error, from the record in Cause No. 198.

(11) Judgment of the Supreme Court of Texas refusing the Application for Writ of Error, and overruling the Motion for Rehearing thereof, from the record in Cause No. 198.

(12) Judgment of the Supreme Court of Texas refusing the Application for Writ of Error, and overruling the Motion for Rehearing thereof, from the record in Cause No. 200.

(13) Stipulation Relative to the Appeal of Amarillo Oil Company, from the record in Cause No. 198.

(14) Pages 4 through 58 of the Statement of Facts in Cause No. 200.

(15) The first 203 pages of Volume I of the Statement of Facts in Cause No. 198.

(16) From the heading "Morning Session, June 30, 1952" on page 187 of the Statement of Facts in Cause No. 200 through page 194.

[fol. 388] (17) The first instrument in Volume II of the Statement of Facts in Cause No. 198 is a printed instrument entitled "Gas Contract Between Michigan-Wisconsin Pipe Line Company and Phillips Petroleum Company, Dated December 11, 1945." The preamble to that Contract and Articles I, II, IV, V, VI, VII, IX, XIV, XVII and XVIII thereof are designated for printing.

(18) Petitions for Appeal in Causes No. 198-201.

(19) Orders Allowing Appeals in Causes No. 198-201.

(20) Citations on Appeal in Causes No. 198-201.

(21) Assignments of Error and Prayers for Reversal in Causes No. 198-201.

(22) Rule 12(3) Statements in Causes No. 198-201.

(23) Statements of Point to be Relied Upon in Causes No. 198-201.

(24) This Stipulation.

Items (18) through (23), *supra*, have been specified because the parties believe that the printing of those instruments may be required by the rules or customs of the Court. If the printing of any or all of those instruments is not required, the Clerk is respectfully requested not to [fols. 389-390] print them.

John Ben Shepperd, Attorney General of Texas. By
W. V. Geppert, Assistant Attorney General Counsel for Appellees; R. Dean Moorhead, an Attorney for Appellants.

(1395)

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JUL 23 1953

SUPREME COURT OF THE UNITED STATES

HAROLD A. WILEY, Clerk

OCTOBER TERM, 1953

No. 193

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
Appellant
vs.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC
ACCOUNTS, ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD
SUPREME JUDICIAL DISTRICT OF TEXAS

STATEMENT AS TO JURISDICTION

D. H. CHASE,
THOMAS L. LAMONT,
R. DEAN MORGAN,
ARTHUR E. SMITH,
A. L. MORGAN,

Counsel for Appellant

CURTIS, MORGAN, BRYANT and
WHITE,
LOONEY, CLARK and MOOREHEAD,
SIDNEY, AUSTIN, BURGESS and
SMITH,
Of Counsel

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 198

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
vs. *Appellant,*
ROBERT S. CALVERT, ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD
SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN, TEXAS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant, Michigan-Wisconsin Pipe Line Company (hereafter sometimes referred to as "Michigan-Wisconsin") submits its statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas in Cause No. 10,117 on its docket.

Opinion Below

The trial judge filed no opinion. The opinion of the Court of Civil Appeals is reported at 255 S. W. 2d 535, and a copy is attached hereto as Appendix A.

Question Presented

Whether a so-called occupation tax imposed by the State of Texas upon interstate natural gas pipeline companies for the privilege of receiving gas into their pipelines within the state for immediate transportation in interstate commerce and measured by the volumes of gas so received into such pipelines may stand consistently with the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States.

Statute Involved

H. B. 285, Chapter 402, page 740, Acts of the 52nd Legislature of Texas (1951), is an "omnibus" tax bill containing provisions relating to taxes of many kinds, only one section of which—Section XXIII of the Act¹—is here involved. A copy of Section XXIII is attached hereto as Appendix B, and the portions that are of special significance here, Subsection 2 and the second sentence of Subdivision (c) of Subsection 1, are here quoted:

Subsection 2 is as follows: (Omitting certain exemptions therein contained that are not here pertinent)

"In addition to all other licenses and taxes levied and assessed in the State of Texas, there is hereby levied upon every person engaged in gathering gas produced in this State, an occupation tax for the privilege of engaging in such business, at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered."

The second sentence of Subdivision (c) of Subsection 1 of such Section XXIII is as follows:

"In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant

¹ Article 7057f, Vernon's Annotated Civil Statutes of Texas (V.A.C.S.).

within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission, whether through a pipeline, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant."

Statement

Michigan-Wisconsin is a natural gas pipeline company holding certificates of convenience and necessity issued by the Federal Power Commission under the Natural Gas Act, 15 U. S. C., Sec. 717, *et seq.* It owns and operates a pipeline transportation system which originates in the Panhandle of Texas, less than two miles from the Oklahoma state line, and terminates at various points in the States of Michigan and Wisconsin. At these points and at other points in Missouri and Iowa, it sells natural gas to local distribution companies which serve domestic and industrial consumers in those areas. Its sole business is the interstate purchase, transportation and sale of natural gas.

All of the gas transported by Michigan-Wisconsin is purchased by it from Phillips Petroleum Company. That company operates a network of pipelines through which it brings the gas from individual wells or groups of wells to its gasoline plant located adjacent to the mouth of Michigan-Wisconsin's pipeline in Hansford County, Texas. At this plant certain liquefiable hydrocarbons (gasoline and other liquid products) are removed from the gas by Phillips, and remain the property of Phillips.

The remaining natural gas, known technically as "residue gas," flows from the absorbers in the Phillips gasoline plant through pipes owned by Phillips for 300 yards to the boundary between the property owned by that company and that of Michigan-Wisconsin. There, without any break in the flow, the gas enters the interstate pipeline

system owned by Michigan-Wisconsin. It is at this point that title to the gas passes from Phillips to Michigan-Wisconsin, and it is this taking or receiving of gas by the latter into its lines which the statute here involved designates as the taxable incident, as will be pointed out in more detail below.

Following the receipt by Michigan-Wisconsin of the residue gas, such gas flows a short distance to a compressor station, where, by raising the pressure of the gas, appellant utilizes the expansion characteristics of the gas as the motive power for further movement along its journey.² From the compressor station in Texas, the gas flows through appellant's pipeline system 1.74 miles to the Oklahoma border, and thence to the consuming markets in other states. Additional motive power for this journey is furnished by 15 other compressor stations which are operated in other states through which the gas is transported. It was stipulated by the parties, and the Court of Civil Appeals found:

"The movement of such gas from the producing wells to points of delivery to Michigan-Wisconsin at the outlet of the Phillips gasoline plant and thence through pipe lines to consumers in Michigan and Wisconsin is a steady and continuous flow. The taking of such gas at the outlet of the gasoline plant is accomplished through facilities owned by Michigan-Wisconsin and used exclusively by it in the taking and transportation of such gas.

"All of the gas is purchased by Michigan-Wisconsin for transportation to points outside Texas, and all of such gas is in fact so transported." Appendix A, *infra*, 255 S. W. 2d at 539.

² A schematic diagram of the operations just described is attached as Appendix B to the opinion of the Court of Civil Appeals, Appendix A, *infra*, 255 S.W. 2d at 548.

Section XXIII of H. B. 285, the statute here involved, levies a tax of 9/20 of one cent per thousand cubic feet upon every person engaged in taking possession of gas for transmission by pipeline, "for the privilege of engaging in such business" (Sec. 2). Reduced to its essentials therefore, the challenged statute levies a tax of 9/20 of a cent per m. c. f. upon Michigan-Wisconsin for the *privilege* of taking possession of natural gas at the inlet of its pipeline for direct, immediate and invariable transportation in interstate commerce.

The taxes levied by Section XXIII were paid by Michigan-Wisconsin under protest, pursuant to the provisions of the statutes of Texas,³ and a suit for their recovery was properly filed against the appropriate state officials in a state district court at Austin, Texas. That court entered judgment for Michigan-Wisconsin for the full amount of the taxes paid plus interest as provided by statute, holding Section XXIII to be violative of the Commerce Clause of the Constitution of the United States. Upon the State's appeal to the Court of Civil Appeals, that court reversed the judgment of the district court, holding the statute valid under the Commerce Clause. Following denial of its motion for rehearing, Michigan-Wisconsin filed an application for writ of error in the Supreme Court of Texas, but that Court refused the application and denied motion for rehearing. By this appeal, appellant seeks review of the decision and judgment of the Court of Civil Appeals which sustained the validity of Section XXIII as applied to appellant's operations against appellant's claim of unconstitutionality under the Commerce Clause.

Jurisdiction

Appellant's application for writ of error was refused by the Supreme Court of Texas on May 6, 1953, and its mo-

³ Article 7057b, Vernon's Annotated Civil Statutes.

tion for rehearing was denied on June 3, 1953. Because the Supreme Court of Texas refused to grant appellant's application for writ of error, the Court of Civil Appeals is the highest court of the State in which a decision could be had. A petition for appeal was presented to the Chief Justice of that Court on June 25, 1953.

The jurisdiction of the Supreme Court to review by appeal the decision of the Court of Civil Appeals herein is conferred by Title 28 U. S. C., Section 1257(2). The decisions sustaining this Court's jurisdiction on appeal include *United Gas Public Service v. Texas*, 301 U. S. 667 (1937); *Lone Star Gas Co. v. Texas*, 304 U. S. 224 (1938); *Bain Peanut Co. v. Pinson*, 282 U. S. 499 (1931); *Adams v. Saenger*, 303 U. S. 59, 61 (1938); *Bacon v. Texas*, 163 U. S. 207 (1896); *Sullivan v. Texas*, 207 U. S. 416 (1907); *San Antonio & Aransas Pass Ry. Co. v. Wagner*, 241 U. S. 476 (1916); *St. Louis, Etc., Ry. Co. v. Seale*, 229 U. S. 156 (1913); *American Railway Express Co. v. Levee*, 263 U. S. 19 (1923).

Manner in Which Federal Question Was Raised

Appellant challenged the validity of Section XXIII under the Commerce Clause of the Federal Constitution specifically and in detail at every stage of the proceedings in the state courts: In its protests (made concurrently with the monthly payments of the tax), its pleadings in the trial court, its brief and motion for rehearing in the Court of Civil Appeals, and in its application for writ of error and motion for rehearing in the Supreme Court of Texas. The Court of Civil Appeals itself stated in the opinion: "The single question presented for our decision is whether Article 7057f, a revenue statute, . . . as applied to the business activities of appellees, violates the Commerce Clause of the Constitution of the United States. If so it is void, if not

it is valid.”⁴ This Court will accept the recognition by the Court of Civil Appeals that the constitutional issue was properly raised in the State Courts. *Charleston Federal Savings & Loan Assn. v. Alderson*, 324 U. S. 182, 185 (1945).

The Question Presented by This Appeal Is Substantial

There is but one issue involved in this appeal and that taken by Panhandle Eastern Pipe Line Company in a companion case: Whether the so-called “gathering tax” imposed by the State of Texas upon interstate carriers of natural gas for the *privilege* of receiving such gas into the mouths of their interstate pipelines can stand consistently with the Commerce Clause of the Constitution. The facts are simple, the issue clear cut. Because the supply of natural gas is concentrated so heavily in Texas and a few other states, a tax upon the receipt of such gas by interstate pipelines for transportation to the great majority of consumer states has wide and important national repercussions.

The cases now before this Court on appeal were selected by the State of Texas and the pipeline companies as typical test cases through which a conclusive determination of the constitutionality of the “gathering tax” statute as applied to pipeline companies taking gas into their pipelines for transportation to other states could be obtained. Accordingly, all lawsuits initiated by others who paid the tax under protest, of which 117 had been filed as of June 12, 1953, have been stayed pending final decision of the Michigan-Wisconsin and Panhandle Eastern cases and will be affected by such decisions. As of that date also, 15.6 millions of dollars of taxes had been paid under protest, and that

⁴ Appendix A, *infra*; 255 S.W. 2d at 537-8.

amount continues to increase at the rate of one million dollars a month.

It is recognized that the substantiality of an appeal is not measured by dollar amounts or even by the number of cases affected by this Court's decision. Undoubtedly, this Court refuses to entertain many applications for further review which involved large sums of money but which raise frivolous or settled federal questions. That the instant appeals are of quite a different character is significantly indicated by the fact that an able and experienced state trial judge found the statute to be incompatible with the Commerce clause, and the Court of Civil Appeals was able to say no more than:

"We have no clear or strong conviction that this statute and the Constitution are incompatible." Appendix A, *infra*; 255 S. W. 2d at 546."⁵

Appellant suggests, however, that the substantiality of this appeal may be judged by a more objective standard—the effect of the statute here involved upon the great national purposes which the Commerce Clause was designed to accomplish. The origins of that clause are to be found, of course, in the commercial warfare between the thirteen original states which began after independence had been won. This Court recently quoted Mr. Justice Story to the effect that during that interval:

"... each State would legislate according to its estimate of its own interest, the importance of its own products, and the local advantages or disadvantages of

⁵ The State Court in effect invited this Court's review of its decision by stating:

"The law will now be inquired into and our conclusions stated as briefly as possible. This we do with full knowledge that the only forum having ultimate and exclusive jurisdiction to authoritatively determine the issue before us is the Supreme Court of the United States."

Appendix A, *infra*; 55 S.W. 2d at 543.

its position in a political or commercial view." Story, *The Constitution*, Sec. 259.

This came "to threaten at once the peace and safety of the Union." *Id.* § 60.⁶

As will be shown below, the statute here under consideration was passed by the Texas legislature as a result of a frank and open estimate of the very local interests referred to by Mr. Justice Story. The statute was deliberately aimed at gas moving in interstate commerce; it was designed to produce revenue for the State of Texas by exacting a toll from interstate commerce; it imposes a heavy and effective burden upon such commerce; and, since, as applied to interstate pipelines, the burden of the tax ultimately will be borne by those persons in other states who consume the gas, the statute enables the State of Texas to achieve the politically popular result of raising revenue at the ultimate expense of citizens of other states. In upholding such a statute, the Court of Civil Appeals disregarded the principles applied in every decision of this Court which is in any way analogous.

1. The Background and Purpose of the Statute

The tax here involved is labeled a gas "gathering tax" and purports to be imposed for the privilege of engaging in the occupation of "gathering gas." However, the term, "gathering," has long been used in the gas and oil industry to mean the picking up of gas or oil at individual wells in the field and assembling it at a common point. *Alexander v. Cosden Pipe Line Co.*, 290 U. S. 484 (1934). Michigan-Wisconsin engages in no such activity. Indeed, the Attorney General of Texas stipulated that Michigan-Wisconsin "gathers" no gas within the meaning of that term, as it

⁶ See *Hood v. DuMond*, 336 U.S. 525, 533 (1949).

is consistently used in the gas industry and in ordinary usage.

Thus, what the Texas Legislature did was to take a well-understood term and give it an artificial definition in the statute. "Gathering gas," as there defined, means the "first taking" of possession of gas by a pipeline company "for other processing or transmission" through its pipeline after the gas passes through the outlet of a gasoline plant. It is not Phillips Petroleum Company, the real "gatherer" of the gas in this case, that pays the tax, but Michigan-Wisconsin, which does no more than receive the gas into the mouth of its pipeline for immediate interstate transportation. Of course, the legislature may define its terms as it chooses. Nevertheless, its appropriation of a well-understood term to describe a totally different activity, upon which the tax is imposed, is sufficient alone to justify a suspicion that the tax is one which, in the words of Mr. Justice Brandeis, is "furtively directed" at interstate commerce.⁷

The legislature's purpose was more candidly stated in the report to the House of Representatives by a member of the House-Senate conference committee, who said:

"You will further recall that by practically every vote that was taken here in the House that we have shown conclusively that *we want a tax on the gas that leaves the State of Texas*. Your Committee feels that the House still wants that very thing. . . . To be perfectly frank with you, and I have nothing whatsoever to hide, that suggested compromise is a cross between a gathering tax and the Hull-Vick amendment. *It will tax the pipeline gas that goes out of the State of Texas and give as much protection as possible to Texas industries*. . . . You know we have approximately twelve million dollars to raise and you people know that twelve million dollars is a large amount of money

⁷ *Cudahy Packing Co. v. Hinkle*, 278 U.S. 460, 468 (1929).

and it will vitally affect the ones that have to pay it. . . . I say to you that the issue is now drawn as to whether or not gas piped out of Texas will be taxed or the money will be raised by adding to the already over-taxed landowner, royalty owner and producer. *I believe that the people of Texas want the gas piped out of the State to be taxed.*" House Journal, June 1, 1951, p. 2979. (Emphasis supplied.) ⁸

Here, at any rate, there is no subterfuge. In order to raise additional money for state purposes, and at the same time to lessen the overall tax burden on state residents, the Texas legislature is in effect attempting to levy a tax upon the people of Michigan and Wisconsin, of Ohio, Kentucky, Indiana and a host of other states; and the interstate commerce among the states, which it was the purpose of the Commerce Clause to protect, is the medium by which this shifting of the burden of taxation is sought to be accomplished.

If any further evidence were needed of the purpose of this statute to tax the consumers of gas in other states by a tax on interstate transportation agencies, it may readily be found in two other provisions of Section XXIII. In the first place, Section 4 makes it unlawful for any "gas gatherer" i.e. interstate pipeline company) to attempt by contract to shift the tax to a producer. In other words, producers of gas cannot under any circumstances be made to bear the burden of this tax; it must at all events be borne by the pipeline companies and their customers, the consumers.

⁸ Of course, the gas that is piped out of Texas is already heavily taxed. The state now levies a production tax amounting to 5.72 per cent of the value of the gas and the producer pays an additional ad valorem tax on the value of his lease and producing facilities. Appellant pays an ad valorem tax on the value of its facilities in the state.

In the second place, Section XXIII expressly provides in Section 11:

“In the event the tax levied by this Section is declared unconstitutional or invalid by a court of competent jurisdiction as to gas gathered for interstate transmission, the tax shall not be levied as to gas gathered for intrastate consumption.”

The greater portion of the natural gas produced in Texas is transported to other states for consumption. The Texas legislature has made it perfectly plain that the purpose of the statute will not be accomplished if it cannot be lawfully applied to gas which moves in interstate commerce.

It is difficult to conceive a clearer case of a tax intended to rest directly upon interstate commerce, or a bolder attempt to make interstate commerce (i.e., the people of other states) bear the burdens of a state's local government.

2. The Effect of the “Gathering Tax” on Interstate Commerce

Every cubic foot of natural gas that leaves the State of Texas is taxed at the rate of 9/20 of a cent per thousand cubic feet. Every gas pipeline company operating lines leaving the state is subject to the tax simply because it “takes possession” of the product within the State for the purpose of transporting it. Obviously, no gas can be transported in interstate commerce unless the carrier first “takes possession” of it. Obviously, too, the Commerce Clause knows no differences of principle based upon the product involved or the method of its carriage. Thus, if Texas may lawfully tax carriers of gas for the privilege of “taking possession” of that commodity for immediate interstate transportation, Minnesota may clearly tax the owners of ore boats for the privilege of “taking possession” of iron

ore at Duluth for immediate transportation to Gary; West Virginia certainly may tax the railroads at so much per ton of coal for the privilege of "taking possession" of that coal for transportation to other states; Michigan would have an equal right to tax the carriers of motor vehicles for the privilege of "taking possession" of those vehicles for transportation throughout the country.

The Commerce Clause was designed to end precisely this kind of impost laid upon commercial intercourse between the states. The tax here involved has exactly the same effect as if Texas had erected custom-houses at points where its highways cross over into other states and was requiring every carrier, upon leaving Texas, to pay a tax on the goods carried, for the privilege of having "taken possession" of those goods within the State. If that kind of tax is to be held valid, custom-houses will certainly spring up on the other side of the State's boundaries in retaliation, and every state may soon be expected to tax heavily the export of those of its products which are most valuable to its neighbors. Cf. *Case of the State Freight Tax*, 15 Wall. 232, 276.

The vice of the present statute is particularly pronounced because of the fact that it concerns a product found in relatively few states but desired in many. From the State of Texas, for example, natural gas flows to some 38 other states. Gas transported by Michigan-Wisconsin alone serves consumers in Missouri, Iowa, Michigan and Wisconsin, and consumers of gas carried by Panhandle Eastern Pipe Line Company reside in Missouri, Illinois, Indiana, Michigan, Ohio, Pennsylvania and Ontario, Canada. The State of Texas thus has a tremendous leverage which it can exert through a tax upon a product dispersed so widely from a single source. Cf. *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 433-434 (1947).

Another effect upon interstate commerce should be noted, namely, that the tax is related arithmetically to the volume of such commerce. Since the tax is fixed at $9/20$ of a cent per m. c. f. of gas of which Michigan-Winconsin "takes possession" for transportation through its pipeline, and since *all* of the gas so taken moves immediately and directly in interstate commerce, the result is that the tax is measured strictly by the amount of interstate commerce which appellant carries on.

Just as in the cases where a state has taxed the entire gross receipts derived from interstate commerce, the "gathering tax" is measured not only by the amount of business done within the state but by the amount done in other states as well. That is, the $9/20$ of a cent per m. c. f. obviously does not attempt to measure the activities carried on by Michigan-Wisconsin within the State of Texas. Appellant pays as much in taxes per unit of volume for the "privilege" of taking possession of gas which it transports a mere 1.74 miles to the Oklahoma line and a thousand miles beyond as is paid by a company which operates a pipeline 500 miles within Texas and only five miles beyond. The words of Mr. Justice Stone, speaking for the Court in *Gwin, White & Prince, Inc. v. Heneford*, 305 U. S. 434, 439, are therefore applicable *in toto* to the present tax:

"Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state: If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce

is being done, the risk of multiple burden to which local commerce is not exposed."⁹

Similarly, in the present case, gas transported by a pipeline solely within the State of Texas would be subject to a single tax of 9/20 of a cent per m. c. f., whereas Michigan-Wisconsin would be subject to an additional tax on a comparable fictitious "local activity" in every state through which its pipeline runs. It is nonsense to say that only Texas could lay such a tax because it is the state of origin of the commerce. If Texas may impose a tax upon pipelines for the privilege of "taking or retaining possession" of the gas in Texas for transportation elsewhere, Oklahoma may levy a tax, measured by the entire volumes of gas transported, for "taking or retaining possession" of the gas within that state, or on any other activity within that state which contributes to the interstate movement of the gas—and so may Missouri, Iowa, Michigan and Wisconsin.

The fact that Congress considers the activities of Michigan-Wisconsin and other interstate pipeline companies to be within the sphere of national interest is indicated by the terms of the Natural Gas Act.¹⁰ Michigan-Wisconsin could not have laid a foot of pipe in Texas or elsewhere for use in the interstate transportation of gas without first having obtained a certificate of convenience and necessity from the Federal Power Commission, and the rates at which it sells gas to distribution companies at the termini of its line are subject to the Commission's regulation.

⁹ The Court also noted: Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state *and burdens the commerce in direct proportion to its volume.*" 305 U.S. at 438. (Emphasis supplied)

¹⁰ Title 15, U.S.C., Sec. 717 (a).

In this connection, the sale of gas by Phillips to Michigan-Wisconsin, which is coincident with the "taking" of the gas by appellant under the Texas statute, was the subject of a very recent decision of the Court of Appeals for the District of Columbia. *Wisconsin v. Federal Power Commission*, No. 11,247, decided May 22, 1953. The question there involved was whether the Federal Power Commission, under the Natural Gas Act, has jurisdiction over that sale, or whether it is a part of the actual "gathering" process conducted by Phillips and thus exempt under the terms of Title 15 U. S. C., Section 717(b). The Court of Appeals held that the Commission has jurisdiction over such sale under the Act. It is significant for present purposes that the Court and all parties to that litigation, including the Commission itself, agreed that the sale and delivery from Phillips to Michigan-Wisconsin are a sale and delivery in interstate commerce. Thus, there was unanimity in the view that the sale and delivery by which Michigan-Wisconsin is enabled to "take possession" of the gas—the act for which it is taxed by Texas—are a sale and delivery in interstate commerce.

It is submitted that the Texas "gathering tax" is violative of the basic purposes and precepts of the Commerce Clause. It has accomplished what its sponsors desired, namely, to "tax the pipeline gas that goes out of the State of Texas and give as much protection as possible to Texas industries." But purposes of this kind are precisely what the Commerce Clause was designed to prevent.

3. The Decision of the Court of Civil Appeals Is Contrary to This Court's Decisions

In referring to the decisions of this Court which were cited in the briefs of the parties, the Court of Civil Appeals said, "None of these cases is factually in point," and the Court added that its decision must therefore "turn upon

a practical application of basic principles adduced from these authorities to the facts.”¹¹ Insofar as the Court’s opinion is capable of rationalization, it appears to rest upon the theory that the taking possession of gas for transportation is a “local activity” separate from interstate commerce and thus not subject to the prohibitions of the Commerce Clause. Aside from the quotation of general statements from certain of this Court’s opinions, the Court of Civil Appeals apparently placed sole reliance upon *Utah Power & Light Co. v. Pfof*, 286 U. S. 165 (1932), where the generation of electric power was held to be sufficiently separate from its transmission to sustain a state tax. Cf. *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927).

The attempted isolation of a pretended or fictitious “local activity” engaged in by an interstate business as the incident to be taxed has been a favorite but futile device by which attempts have repeatedly been made to circumvent the Commerce Clause. This Court stated in *Nippert v. Richmond*, 327 U.S. 416, 423 (1946):

“ . . . If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from ‘the transportation or intercourse which is’ the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a State could not be segregated by an Act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the States and necessarily involves ‘incidents’ occurring within each State through which it passes or with which

¹¹ Appendix A, *infra*; 255 S.W. 2d at 543.

it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result."

That the State of Texas did in this case "carve out from what is an entire or integral economic process" a particular phase or incident, which it has labeled as "separate and distinct" or "local" cannot be gainsaid. *Memphis Steam Laundry v. Stone*, 342 U.S. 389, 393 (1952). It is argued that the act of "taking possession" of gas for transmission interstate through a pipeline is separate and distinct from that transmission. How can a carrier possibly transport goods unless it first "takes possession" of them? One can readily visualize *production* of a commodity without transportation, and it is on this basis that taxes on *production* of goods for subsequent transportation in interstate commerce have been sustained. *Utah Power & Light Co. v. Pfof*, 286 U.S. 165, 180, 182 (1932); *Hope Natural Gas Co. v. Hall*, 274 U.S. 284, 288 (1927); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 178 (1923).¹² But is it possible to visualize the transportation of an article apart from the carrier's taking possession of the article? Under any conceivable view of the economic process of transportation, one is an inseparable, invisible part of the other.

That, certainly, has always been this Court's view of the process of "taking possession" of goods for interstate com-

¹² The very distinction which the Court of Civil Appeals refused to recognize is specifically drawn in the *Pfof* case, upon which the state court relied. In that case this Court stated: "We think, therefore, it is wholly inaccurate to say that appellant's entire system is purely a transferring device. On the contrary, the generator and the transmission lines perform different functions, with a result comparable, so far as the question here under consideration is concerned, to the manufacture of physical articles of trade and their subsequent shipment and transportation in commerce." 286 U.S. at 180-181.

merce. In the so-called "stevedoring cases," *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937), and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947), this Court struck down state statutes which levied a tax upon the receipts of companies engaged in loading ships for interstate commerce. In its opinion in the earlier case this Court pointed out:

"The business of appellant, in so far as it consists of the loading and discharge of cargoes by longshoremen subject to its own direction and control, is interstate or foreign commerce.

"Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination . . ." 302 U.S. at 92.

And in the *Carter & Weekes* case, this Court said:

" . . . The transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself." 330 U.S. at 427-8.

It is not without significance that the Court of Civil Appeals, in describing Panhandle Eastern's activities, stated that "Panhandle *loads* its interstate pipeline with gas from the outlets of three gasoline plants, . . ."¹³ It is this very act of "loading its pipeline" upon which the State of Texas has placed an occupation tax, despite the fact that this Court has said that interstate commerce, "at the least, begins with loading and ends with unloading."

Similarly, in *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885), this Court struck down a state tax upon a

¹³ Appendix A, *infra*; 255 S.W. 2d at 539; emphasis supplied.

ferry company operating between Philadelphia and Gloucester, New Jersey, saying:

“... the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. *Transportation implies the taking up of persons or property at some point and putting them down at another.* A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation.” 114 U.S. at 203. (Emphasis supplied)

This statement is a conclusive answer to the contention that interstate pipeline companies may constitutionally be taxed for the privilege of receiving gas into their pipelines, which is the method by which they “take possession” of the gas. The activity of receiving gas for interstate transportation is not “local” in the sense that it is one that is carved out of the integral economic process of the transportation itself.

Once the gas is “taken” by Michigan-Wisconsin at the mouth of its pipeline, the gas can have but one destination—the ultimate markets in Missouri, Iowa, Michigan and Wisconsin. This is true, first, because the pipeline has no other outlets within (or without) the State of Texas through which gas might be diverted, and, second, because appellant’s certificates of convenience and necessity specify points outside Texas to which and to whom the gas must be delivered. This case thus presents the ultimate in certainty of interstate destination from the moment Michigan-Wisconsin takes possession of the gas.¹⁴

¹⁴ As a matter of fact, the destination of the residue gas purchased by Michigan-Wisconsin from Phillips is fixed from the moment it leaves the

This case also presents the ultimate in continuity of interstate movement. As indicated above, the parties have stipulated, and the Court below noted:

“The movement of such gas from the producing wells to points of delivery to Michigan-Wisconsin at the outlet of the Phillips gasoline plant and thence through pipelines to consumers in Michigan and Wisconsin is a steady and continuous flow.” (Appendix A, *infra*; 255 S.W. 2d at 539.)

There is no storage here involved, no break, no hesitation, but a continuous even movement into appellant’s pipeline, through its compressor station and across the state line.¹⁵

There remains one statement in the opinion of the Court of Civil Appeals about which comment should be made. At the conclusion of its opinion, the Court stated:

“The taxable event described by the statute, as to Michigan-Wisconsin, occurs between processing conducted by Phillips and further processing done by Michigan-Wisconsin in the State of Texas, all prior to the time the gas is finally committed to its interstate journey.” Appendix A, *infra*; 255 U.S. 2d at 546.

Appellant is frankly at a loss to know what “further processing” Michigan-Wisconsin conducts in the State of Texas—or anywhere else. After the gas enters Michigan-Wisconsin’s lines it goes immediately into a compressor station and thence into appellant’s 24-inch line and immediately across the state line into Oklahoma.

wellhead, since Phillips is bound by contract to deliver to Michigan-Wisconsin the residue gas from all wells drilled in acreage “dedicated” to the latter. *Eureka Pipe Line Co. v. Hallanan*, 256 U.S. 265 (1921); *United Fuel Co. v. Hallanan*, 257 U.S. 277 (1921); *Peoples Natural Gas Co. v. Pub. Serv. Com.*, 270 U.S. 550 (1926).

¹⁵ Under circumstances of similar continuity of movement and certainty of destination, this Court had “no doubt” that the movement of gas was in interstate commerce. *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 687 (1947).

If, by "further processing," the Court meant the operation of appellant's compressor station, the statement is without foundation. The only purpose of the compressor station, as this Court knows, is to build up pressure sufficient to move the gas along the pipeline.¹⁶ It supplies the motive power by which interstate commerce is conducted, just as a locomotive, a truck-tractor or a ship's turbine supplies the motive power for those forms of transportation. The Court of Civil Appeals itself noted earlier in its opinion:

"The taking of such gas at the outlet of the gasoline plant is accomplished through facilities owned by Michigan-Wisconsin *and used exclusively by it in the taking and transportation of such gas.*" Appendix A, *infra*; 255 S.W. 2d at 539.

It is familiar law that facilities used in effectuating the interstate movement of goods are themselves in interstate commerce. Referring to the use of such facilities as a "processing" operation cannot change the facts, or the application of the Commerce Clause to the facts.

Moreover, contrary to the assertion of the Court below, the gas is "committed" to interstate commerce before it enters the compressor station in every conceivable sense of the word. It can go nowhere else, physically or contractually, from the moment it enters Michigan-Wisconsin's lines at the outlet of the Phillips gasoline plant. *Hughes Bros. Timber Co. v. Minn.*, 272 U.S. 469, 475-6 (1926). It does so invariably, unceasingly, unhesitatingly. How the gas could be more firmly "committed to interstate commerce" than is the case when appellant takes possession of the gas from Phillips is quite beyond comprehension.

¹⁶ In *Interstate Natural Gas Co. v. Federal Power Commission* (Note 15 *supra*), this Court stated that "the increase of pressure in the compressor stations must be regarded as merely an incident in the interstate commerce rather than as its origin." 331 U.S. at 689.

Conclusion

Appellant respectfully suggests that enough has been presented to demonstrate that this appeal, and that filed by Panhandle Eastern Pipe Line Company in a companion case, bring before this Court a question under the Commerce Clause that is far reaching and important, both in terms of legal principles and of practical impact upon the consumers of gas throughout the nation.

In order to "tax the pipeline gas that goes out of the State of Texas," (House Journal, June 1, 1951, p. 2979), the state legislature has conjured up a fictitious name and a fictitious "local activity" upon which to impose the tax. The residents of the consuming states had no voice in that determination. But they had spoken over 150 years ago when their representatives drafted a Constitution which provided that no state may take any action which has the effect "of impeding the free flow of trade between the States." *Freeman v. Hewit*, 329 U.S. 249, 252 (1946). Judged by that standard, Section XXIII of H.B. 285, the Texas "gathering tax" statute, cannot stand.

Respectfully submitted,

D. H. CULTON,
EVERETT L. LOONEY,
R. DEAN MOORHEAD,
ARTHUR R. SEDER, JR.,
S. A. L. MORGAN,
Counsel for Appellant.

CULTON, MORGAN, BRITAIN & WHITE,
LOONEY, CLARK & MOOREHEAD,
SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel.

APPENDIX "A"

IN THE COURT OF CIVIL APPEALS, THIRD
SUPREME JUDICIAL DISTRICT OF TEXAS, AT
AUSTIN

No. 10,116

ROBERT S. CALVERT, Comptroller et al., *Appellants*,
vs.

PANHANDLE EASTERN PIPE LINE COMPANY, *Appellee*

No. 10,117

ROBERT S. CALVERT, Comptroller et al., *Appellants*,
vs.

MICHIGAN-WISCONSIN PIPE LINE COMPANY, *Appellee*

No. 10,118

ROBERT S. CALVERT, Comptroller et al., *Appellants*,
vs.

AMARILLO OIL COMPANY, *Appellee*

OPINION—Feb. 4, 1953

From District Court of Travis County, 126th Judicial
District, Nos. 91,332, 91,338 and 91,508, Respectively

Hon. Jack Roberts, Judge

These three causes in all of which Texas officials Robert S. Calvert, Comptroller of Public Accounts, Price Daniel, Attorney General and Jesse James, State Treasurer, are appellants and the Panhandle Eastern Pipe Line Company is appellee in Cause No. 10,116, the Michigan-Wisconsin Pipe Line Company is appellee in Cause No. 10,117 and the Amarillo Oil Company is appellee in Cause No. 10,118,¹ were

¹ These appellees will be hereinafter referred to as Michigan-Wisconsin, Panhandle and Amarillo, respectively.

consolidated for trial below, were consolidated in this Court for hearing and argument and will all be disposed of by this opinion.

These suits were all brought under and in compliance with Art. 7057b, Vernon's Annotated Civil Statutes of Texas, authorizing and regulating institution of suits for the recovery of license and privilege taxes paid under protest.

Each appellee sought recovery of taxes paid under protest, such payments having been made in obedience to the provisions of Art. 7057f, Vernon's Annotated Civil Statutes of Texas.²

Trial below was nonjury and resulted in judgments for appellees for recovery of the sums for which they sued.

Findings of fact and conclusions of law were not requested of nor filed by the trial judge.

The single question presented for our decision is whether Article 7057f, a revenue statute, the pertinent portions of which are set out below,³ as applied to the business activities

² Sec. XXIII, H.B. 285, Chapter 402, page 740, Acts of 1951, 52nd Legislature of the State of Texas.

³ "Art. 7057f. Occupation tax on business of gathering gas. Definitions: Section 1. The provisions of Texas Revised Civil Statutes (1925) Articles 10, 11, 12, 14, 22, and 23 and Texas Laws 1947, Chapter 359, on the interpretation of Statutes shall apply specifically to this Section. In addition to these standard definitions, in this Section, unless the context otherwise requires:

"(a) 'Gas' means natural and casing-head gas or other gas taken from the earth or waters, regardless of whether produced from a gas well or from a well also productive of oil, distillate, condensate or other product.

"(b) 'Casing-head gas' means any gas or vapor indigenous to an oil stratum and produced from such stratum with oil.

"(c) 'Gathering gas' means the first taking or the first retaining of possession of gas produced in Texas for transmission whether through a pipe line, either common carrier or private, or otherwise after severance of such gas, and after the passage of such gas through any separator, drip, trap, meter or other method designed to separate the oil therefrom. In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipe line, either common carrier or

of appellees, violates the commerce clause of the Constitution of the United States.⁴ If so it is void, if not it is valid.

private or otherwise after such gas has passed through the outlet of such plant.

"(d) 'Gatherer' means any person engaged in the gathering of gas.

"(e) 'Person' means and includes any person, firm, concern, receiver, trustee, executor, administrator, agent, institution, association, partnership, company, corporation, and persons acting under declarations of trust, as well as trustees acting under declarations of trusts.

"(f) 'Cubic foot of gas' or 'standard cubic foot of gas' shall have the definition ascribed thereto by Texas Laws, 1949, Chapter 519, Section 4, Texas Revised Civil Statutes (Vernon, 1948), Article 7047b, Section 2 (12).

"Imposition of tax; amount; calculation.

"Sec. 2. In addition to all other licenses and taxes levied and assessed in the state of Texas, there is hereby levied upon every person engaged in gathering gas produced in this State, an occupation tax for the privilege of engaging in such business, at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered.

"In determining the quantity of the gas for the purposes of calculating such tax, there shall be excluded (a) gas produced and then lawfully injected into the earth of this State; (b) gas used for fuel in connection with lease or field operations; (c) gas lawfully vented or flared; and (d) gas used in the manufacturing of carbon black.

"Payment; penalty for delay.

"Sec. 3. The tax levied hereby shall be paid by the gatherers on the 25th day of each month on all gas gathered in the State during the next preceding thirty (30) days prior to the first day of the month in which payment is required to be made. If such payment is not made within the time above prescribed, the amount due shall become delinquent and a penalty of ten percent (10%) of the amount of the tax shall be added and such tax and penalty shall bear interest at the rate of six per cent (6%) per annum from date due until paid.

"Unlawful to require producer to pay.

"Sec. 4. The tax imposed by this Act is a tax on the occupation of gathering gas and not on the production of gas; therefore, it shall be unlawful for any gas gatherer to require any producer to pay the tax imposed under this Act under any contract provision between the producer and the gas gatherer allowing the gatherer to deduct from sums owed the producer amounts paid by the gatherer to deduct from sums owed the producer amounts paid by the gatherer by reason of the imposition of a tax on production. . . .

"Sec. 11. In the event the tax levied by this section is declared unconstitutional or invalid by a court of competent jurisdiction as to gas gathered for interstate transmission, the tax shall not be levied as to gas gathered for intrastate consumption."

⁴ Section 8 of Article I of the Federal Constitution provides that Congress shall have the power "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." (C1.3).

Each appellee is engaged in the business of transporting natural gas by pipe line. There is no dispute as to the manner in which their business activities were conducted. These matters were stipulated. Since Michigan-Wisconsin presents the strongest factual position favorable to appellees we will fully describe it and its activities first.

Michigan-Wisconsin is a natural gas company as defined in the Federal Natural Gas Act and holds certificates of convenience and necessity issued by the Federal Power Commission. Such certificates authorize it to engage in interstate transportation and sale of natural gas. It has constructed a pipe line which originates at a point in Hansford County, Texas, and which terminates at various points in the States of Michigan and Wisconsin. At these points, and at other points in the States of Missouri and Iowa, it sells natural gas to distribution companies which serve markets in those areas. It sells no gas in Texas.

Michigan-Wisconsin produces no gas in Texas or elsewhere. Rather, it supplies its markets by purchasing gas from Phillips Petroleum Company. Through a network of pipe lines, Phillips brings natural gas from the wells from which it is produced to its Sherman gasoline plant located in Hansford County, Texas. At this plant, certain liquefiable hydrocarbons are removed from the gas, and, at the outlet side of the plant, Phillips sells the gas to Michigan-Wisconsin.

Under contracts between Phillips and Michigan-Wisconsin, Phillips obligates itself to deliver to Michigan-Wisconsin all of the requirements for the latter's pipe line, up to a maximum of 343 million cubic feet daily. To secure performance of this agreement, Phillips has dedicated all of the gas underlying certain lands described in the contracts, and with minor exception, has agreed that it will sell no gas from such lands to anyone except Michigan-Wisconsin.

In these contracts, Phillips reserved the right to extract certain liquefiable hydrocarbons from the raw gas. This extraction is performed by Phillips with absorbers at its gasoline plant. When the gas leaves the absorbers it flows through pipes owned by Phillips for a distance of 300 yards to the outlet of the gasoline plant. When the gas emerges from the outlet, it flows directly into the pipe line of

Michigan-Wisconsin, and it continues flowing through the Michigan-Wisconsin pipe line system until it reaches markets in other states.^{4a} This pipe line is in the State of Texas for only 1.74 miles, the remainder being in other states.

The movement of such gas from the producing wells to points of delivery to Michigan-Wisconsin at the outlet of the Phillips gasoline plant and thence through pipe lines to consumers in Michigan and Wisconsin is a steady and continuous flow. The taking of such gas at the outlet of the gasoline plant is accomplished through facilities owned by Michigan-Wisconsin and used exclusively by it in the taking and transportation of such gas.

All of the gas is purchased by Michigan-Wisconsin for transportation to points outside Texas, and all of such gas is in fact so transported.

It was further stipulated by the parties:

“Natural gas in going through a gasoline plant or other process to separate oil, gasoline or other liquid hydrocarbons or to extract hydrogen sulphide or carbon dioxide or any other element undergoes certain changes, both in quality and quantity. Among the changes are these: The residue gas leaving the extraction or separating device is usually at a lower pressure, the temperature is sometimes higher, and the specific gravity of the gas is less than that of the natural gas which enters such plant. There are differences between the proportion of the methane content, the ethane content and the content of other hydrocarbons. Likewise, when the hydrogen sulphide or carbon dioxide are extracted,

^{4a} This gas after its delivery to Michigan-Wisconsin at the outlet of the processing plant travels through two 26-inch pipe lines a distance of approximately 1215 feet to a compressor station owned and operated by Michigan-Wisconsin at which station the pressure of such gas is raised from approximately 200 pounds to approximately 975 pounds. In the compressor station the gas is compressed, cooled, scrubbed and dehydrated in the course of the flow through the station. At the outlet of such compressor station, such gas passes into Michigan-Wisconsin's 24-inch pipe line, flowing through such pipe line approximately 1.74 miles to the Texas-Oklahoma line and continuing through such pipe line to markets outside the State of Texas.

there is a percentage variance in the constituents remaining in the gas. In addition to these changes in constituents, the volume of the residue gas is less than the volume of the natural gas which enters the extraction plant due to the removal of some of the constituents of the natural gas."

Except for minor variations Panhandle conducts its activities in the same manner as Michigan-Wisconsin. Panhandle loads its interstate pipe line with gas from the outlets of three gasoline plants, rather than with gas from only one plant; it produces a portion of the gas which it takes at the outlet of one of such plants; and it makes sales in Texas to three small customers, rather than sending all of its gas outside the State.⁵

Amarillo produces no gas. It purchases gas produced in Texas and transports it by pipe lines in intrastate commerce only.⁶

Regarding the natural gas business in Texas it was stipulated that:

"But for the Texas oil and gas conservation statutes, and the enforcement by the Railroad Commission of Texas, producers in the field could drill as many wells as they desired and could open their wells at the rate of 100% open flow and could burn both the sweet and sour gas for the production of carbon black, or they could extract the gasoline and other liquid hydrocarbons in a gasoline plant and flare the residue gas. If this happened, the gas in the reservoir would become depleted in the course of a few years. If only a portion of the producers in the field drilled additional wells and operated such wells at 100% open flow, such producers would in the course of a few years drain the gas from under the acreage of the producers who were not also producing at 100% open flow from a proportionate number of wells. After such field should be depleted,

⁵ A schematic diagram of the operations of Michigan-Wisconsin and Panhandle is attached to and made a part of this opinion.

⁶ Amarillo's only ground of protest is based on Sec. 11 of Art. 7057f, copied supra.

neither Michigan-Wisconsin nor any other purchaser of gas could supply its market demand with gas from such fields and the same would be true with respect to any other field in the state which might be subjected to the same rapid depletion in the absence of the Texas oil and gas conservation statutes and the enforcement thereof."

Stipulated too was that the State of Texas exercises control and jurisdiction over the drilling, completing, and production of oil and gas wells, and over the plants that extract gasoline or other liquid hydrocarbons from gas, and that neither the Congress of the United States, the Federal Power Commission, nor any other Federal Agency has by any law, rule or regulation exercised any control or jurisdiction over such activities.

William James Murray, Jr., a petroleum engineer by profession and a member of the Railroad Commission of Texas, the state agency which enforces oil and gas conservation statutes, testified, without contradiction, at length regarding the special benefits conferred upon the gas industry by such statutes and their enforcement.

After recounting the successful efforts of the Railroad Commission in curtailing the flaring and wasting of gas⁷ Mr. Murray was interrogated as follows:

"I would like for you to explain if it is a fact how the State of Texas, by virtue of the oil and gas conservation statutes and their enforcement by the Railroad Commission, has given any opportunities, if it has, and afforded any protection or conferred any benefits upon those who take or retain gasoline—gas at the outlet of a gasoline processing plant for transmission through pipelines? Has the State of Texas conferred any benefits or privileges to those people by virtue of its conservation laws?

⁷ That Texas courts had a part in these efforts see *Railroad Commission v. Shell Co. Inc.*, 146 Tex. 286, 206 S.W. 2d 235; *Railroad Commission v. Sterling Oil and Refining Co.*, 218 S.W. 2d 415, 147 Tex. 547, and *Railroad Commission v. Flour Bluff Oil Corporation*, 219 S.W. 2d 506 (Austin C.C.A., writ ref.).

"A. Yes, I think very material benefits.

"Q. Will you explain in detail what those benefits are?

"A. Well, partially my explanation would involve repetition of my statement earlier, that an interstate or intrastate pipe line must spend a tremendous amount of money in laying these facilities, and therefore, they have got to have assurance of long life reserves, and by preventing waste of gas, by increasing recovery of gas, we have given them the assurance of these long life reserves, which have made it possible for them to build the lines and for them to reap great profits from it. I could illustrate, back years ago when we were flaring so much gas from the Panhandle, you remember I mentioned at one time we were flaring a billion feet of gas a day, and here gas was just going to waste, and cities back East were very desirous, much in need of natural gas, but you couldn't afford to build a pipe line from the Chicago area, for example, to the Panhandle, even though the gas was so cheap they were just blowing it into the air instead of saving it. You could get your gas for nearly nothing, but you couldn't afford to build a pipe line down there because that field wasn't going to last long enough under the poor conservation practices to pay out the line, even though they could have been given the gas, and then when legislation and Commission regulation that wastage of gas was stopped, and it became apparent that when the reserves of the Panhandle were going to be required to be wisely utilized, they could then see that they had reserves for many years. We will talk in the terms of 25 years, and so a great number of gas pipe lines began to be built. I very keenly feel that conservation has made it possible, made it financially practical for these intercontinental, transcontinental pipe lines to come into business, and I trust I have made my answer clear in that phase. Now, after the day of stopping the flaring of gas, the Commission's regulation of casinghead gas, and our drive to stop the flaring of casinghead gas had gone hand in glove with the building of

new interstate gas pipe lines to come get this casinghead gas. I regret I don't have in mind the reserves of the state, but nearly fifty per cent, if I recall correctly, of the gas reserves of this state is casinghead gas. Excuse me. There is nearly fifty per cent as much casinghead gas reserves as there is natural gas reserves. Well, there, when you start using casinghead gas instead of just blowing it to the air, look how tremendously you have increased the potential reserves of gas in Texas which are available to supply these interstate pipe lines, and the report of the Gas Conservation Engineering, on which I was privileged to serve, has been used in rather numerous Federal Power Commission hearings showing how much casinghead gas was being produced and flared down in Texas and how the Railroad Commission was planning to force the curtailment of that waste, and that therefore these reserves would be available for dedication to these pipe lines. . . .

"Q. Mr. Murray, I believe you stated that in your opinion, that in the absence of our state conservation laws and the enforcement by the Railroad Commission, that it would not have been economically feasible to have built a long line of pipe line to come in and get natural gas. I believe you stated that, didn't you?

A. Yes, sir. . . .

A. My answer was yes, that I had so stated, both that in my opinion, and historical events demonstrate that it was true that they could not build them in the absence of those regulations, and the pipe lines began to be built only after the regulations.⁸

⁸ This latter statement was modified on cross examination, Mr. Murray saying:

"I have previously explained my lack of clarity yesterday in my thinking and my understanding of just what we were restricted to, and I was largely discussing general principles as applicable to the State as a whole. I do not retract in the slightest the general statement that it is not feasible to build a transcontinental pipe line into an area where terrifle waste will take place. I may have left the impression that no pipe lines were built into the Panhandle until after the waste had been stopped. I actually didn't have in mind the dates when all of the lines were built into the Panhandle, but

Q. I will ask you to state in your opinion what would the effect be upon those that are now taking and retaining the gas for transmission to the eastern and northern states, if the State of Texas repealed its conservation laws at this time or just failed to enforce them?

A. If all of the oil and gas conservation laws were repealed or there was no enforcement of the laws, the effect on these pipe lines, in my judgment, would be to cause great loss of investment. I don't think any of the recently built pipelines which have not been paid out would ever be amortized, and there would be also a great suffering on the part of the consumers who are dependent upon these sources of supply of gas. . . ."

Another benefit accruing to purchasers of gas in Texas and credited to its regulation of the industry was that of making nominations for gas to satisfy market demand about which Mr. Murray testified:

" . . . In your opinion, Mr. Murray, does this privilege conferred upon takers of gas or the folks that are retaining gas for transmission in both interstate and intrastate commerce, to make nominations in order to measure the—meet their market demands, do you consider that a valuable right and privilege?

"A. Oh, yes, very definitely, for the purchaser. The whole point of the nominations is to assure to the purchasers of gas within the limits of ratable take, that they will get the gas that they need. As far as the producer is concerned and the Commission is concerned, we could just set a fixed amount of gas each month and allow them to produce that amount of gas each month,

a good many of those lines, as was brought out on cross-examination, were built prior to the beginning of the large amount of wastage in the Panhandle, and I can state that those lines would have been severally adversely affected, those lines already built, had the waste which began to occur after the lines were built had been allowed to continue. It is doubtful in my judgment whether the lines would ever have been able to amortize, if waste had continued at the maximum rate at which gas was wasted from the Panhandle Field."

it would be a whole lot easier on the producer and a lot easier on the Commission, but it wouldn't assure the purchaser the gas he wants, and so we go to a tremendous amount of trouble and calculations in order to see that always the purchaser is getting the gas that he wants. Consequently I do consider it a very valuable right and privilege, and if I might amplify my answer a while ago, the Legislature specifically for the benefit of the pipeline passed an over and under six months balancing provision, so that in the case I mentioned a while ago, while there was—say, the Carthage Field where there are several pipelines, if a producer doesn't happen to have connections to sufficient wells to give him as much allowable as he needs during a particular month, he can overproduce. The Legislature said that is all right, and the Commission says that is all right. It is kind of like an overdraft at the bank, and then the next month, if his demand has fallen off, he may have too much gas, and then he underproduces and makes up his overdraft, and he can overdraw for a period of six months, and then have six months in which to make it up. Now, if in the period of a year's time you don't balance out, why, then, we begin to start cutting them off, and say: 'Look, you just might as well get out and hustle you some more gas.' Just like your banker will take care of your overdraft for a while, but not indefinitely, but that has gone a long ways toward solving the problem of the Commission requirement that ratable take exists between the producers, and affording these various pipelines serving a single field the ability to get gas whenever their particular customers demand it, and I do consider that a very valuable right and privilege to the gas companies."

The point at which maximum benefits of State regulation was attained was fixed by Mr. Murray as being at the outlet of the processing plant, his testimony in this regard being:

"In the case of either gas well gas or casinghead gas that is processed in a plant for the extraction of gasoline or other liquid hydrocarbons, at which place could

such gas be taken or retained by a person for transmission so that the person so taking or retaining for transmission would receive the maximum benefit of whatever benefits he does receive from the enforcement of our state oil and gas conservation statutes?

"A. Well, I would say obviously the maximum benefit would be at the outlet of the plant, because the plant itself operates under the Commission's conservation regulations, and benefits accrue from these regulations of the operation of the plant, and so my answer the point at which the maximum benefits occur would be after the gas has been finally processed through the plant, at the outlet of the plant.

"Q. Where gas is produced and flows from the well head to a plant that separates the gasoline or other liquid hydrocarbons therefrom, where is the first place that gas could be taken or retained for transmission that such gas is in the best or proper condition to be transmitted by a pipeline for any considerable distance?

"A. Well, now, I am assuming from your question by the fact that the gas is processed in a plant that it needs to be processed in a plant, and consequently gas which has sufficient liquid content that it requires processing isn't in suitable condition for long distance transportation until it has been processed, and therefore it obviously follows that the first time the gas is suitable for transmission, bearing in mind I am predicating it on it being wet gas to start with, is after it has been processed through a plant. Now, by further explanation that there are dry gas wells which do produce gas that is suitable in its condition as it comes from the well head to be transmitted through a pipeline, but you don't process that kind of gas in a gasoline plant, so when you told me that it was being processed, it obviously followed that it is only suitable for transmission after it has been processed.

"Q. You said after it has been processed. Do you mean by that at the outlet of the gasoline plant?

"A. Yes, sir, at the outlet of the gasoline plant."

So much for the facts.

The law will now be inquired into and our conclusions stated as briefly as possible. This we do with full knowledge that the only forum having ultimate and exclusive jurisdiction to authoritatively determine the issue before us is the Supreme Court of the United States.

Our conclusions, presently to be stated, have been reached after a painstaking study of all the Federal Supreme Court decisions which have been cited by the parties. None of these cases is factually in point. This case then must turn upon a practical application of basic principles adduced from these authorities to the facts. As stated by the court in *Union Brokerage Company v. Jensen*:⁹

"We have considered literally scores of cases in which the States have exerted authority over foreign corporations and in doing so have dealt with aspects of interstate and foreign commerce. Whatever may be the generalities to which these cases gave utterance and about which there has been, on the whole, relatively little disagreement, the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances. To review them to any extent would be writing the history of the adjudicatory process in relation to the Commerce Clause."

Similarly in *Utah Power and Light Co. v. Pfof*:¹⁰

". . . we must not lose sight of the fact that taxation is a practical matter and that what constitutes commerce, manufacture or production is to be determined upon practical considerations."

The problem of the federal courts in this field of litigation has been "to reconcile competing constitutional de-

⁹ 322 U.S. 202, 88 L. ed. 1227.

¹⁰ 286 U.S. 165, 76 L. ed. 1038.

mands so that commerce between the states shall not be unduly impeded by state action, and that the power to levy taxes for the support of state government shall not be unduly curtailed.”¹¹

It is certain that the State may not for revenue purposes levy a direct tax upon the privilege of engaging in interstate business.¹²

It is equally certain that:

“(But) it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, *Western Live Stock v. Bureau of Revenue*, 303 US 250, 254, 82 L. Ed. 823, 826, 58 S. Ct. 546, 115 ALR 944. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress.”¹³

After referring to various decisions the Court continued:

“In few of these cases could it be said with assurance that the local tax does not in some measure affect the commerce or increase the cost of doing it. But in them as in other instances of constitutional interpretation so as to insure the harmonious operation of powers

¹¹ *McGoldrick v. Berwind-White Coal Min. Co.*, 309 U.S. 33, 84 L. ed. 565.

¹² *Spector Motor Service v. O'Connor*, 340 U.S. 602, 95 L. ed. 573. However, money payments burdening interstate commerce may be exacted by the State as reimbursement for providing facilities and enforcing lawful regulations of commerce. *Ingels v. Marf*, 300 U.S. 29, 81 L. ed. 653.

¹³ *McGoldrick v. Berwind-White Coal Min. Co.*, 309 U.S. 33, 84 L. ed. 565.

reserved to the states with those conferred upon the national government, courts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed."

In *Memphis Natural Gas Co. v. Stone*,¹⁴ it was said:

"The federal courts have sought over the years to determine the scope of a state's power to tax in the light of the competing interests of interstate commerce, and of the states, with their power to impose reasonable taxes upon incidents connected with that commerce. See *Gwin, White & Prince v. Henneford*, 305 U. S. 434, 441, 83 L. Ed. 272, 277, 59 S. Ct. 325. We continue at that task, characterized long ago as an area of 'nice distinctions.' . . .

"The cases just cited in the note show that, from the viewpoint of the Commerce Clause, where the corporations carry on a local activity sufficiently separate from the interstate commerce state taxes may be validly laid, even though the exaction from the business of the taxpayer is precisely the same as though the tax had been levied upon the interstate business itself. But the choice of a local incident for the tax, without more, is not enough. There are always convenient local incidents in every interstate operation. *Nippert v. Richmond*, supra (327 U. S. at 423, 90 L. Ed. 764, 66 S. Ct. 586, 162 ALR 844). The incident selected should be one that does not lend itself to repeated exactions in other states. Otherwise intrastate commerce may be preferred over interstate commerce."

and the Court concluded:

"We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its bord-

¹⁴ 335 U.S. 80, 92 L. ed. 1832.

ers. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, give protection and that state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

In *Spector Motor Service v. O'Connor*,¹⁵ it is said:

"It is not a matter of labels. The incidence of the tax provides the answer."

The incidence of the tax here is, according to the statute, the gathering of gas, defined to be:

"... the first taking or the first retaining of possession of gas produced in Texas for transmission whether through a pipe line, either common carrier or private, or otherwise after severance of such gas, and after the passage of such gas through any separator, drip, trap, meter or other method designed to separate the oil therefrom. In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipe line, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant."

That the gathering of gas, so defined, is a local activity within the State of Texas and not subject to repetition elsewhere is apparent and since appellees do not allege the statute to be discriminatory, the sole question is whether such local activities are so closely related to and such an integral part of the interstate business of appellees who

¹⁵ 340 U.S. 602, 95 L. ed. 573.

transport gas in interstate commerce as to be within the scope of the Commerce Clause of the Constitution.

Considered from a practical point of view, we think not.

If the incidence of the tax here was the production of gas there would be no question about the validity of the statute.¹⁶ The tax here is not so laid. In fact the statute makes unlawful the saddling of this tax upon the producer. The reason for this is to be partly found in references in legislative debates to the "already overtaxed landowner, royalty owner and producer."¹⁷ This situation could only result from long term commitments to sell gas at low prices, otherwise the Legislature would not have been so solicitous for the welfare of the producer for if the producer could pass on to the consuming public a tax increase then his position would not be one of hardship.

If on the other hand the Legislature was impotent to levy a tax relating to this gas because, as appellees contend, it "is in interstate commerce from the time it leaves the mouths of the wells" then the only legislature alternative was to levy an additional production tax without regard to the disastrous effect which might be visited upon producers.

There is nothing illegal nor immoral in the enactment of tax laws with the knowledge and expectation that those upon whom the tax initially falls will make recoupment from others.¹⁸ Most excise taxes are of this nature and unless they can be passed on to the consumer the manufacturer or producer could not long survive.

Of course landowners and producers of gas could have protected themselves by contract but when gas was so worthless as to be flared at the rate of a billion cubic feet daily from one Texas field it is small wonder that producers

¹⁶ *Hope Natural Gas Company v. Hall*, 274 U.S. 284, 71 L. ed. 1049.

¹⁷ House Journal, June 1, 1951, p. 3350.

¹⁸ *Texas Company v. Brown*, 258 U.S. 466, 66 L. ed. 721.

and owners did not quibble over contract terms when anything at all was offered for their gas.

We also have the firm conviction that the power of the State, employed through the exercise of legislative discretion, to select local incidents related to interstate commerce for the purpose of taxation should not be limited or defined by the physical properties or characteristics of the subject matter which in this instance is natural gas.

As we view it these characteristics form the basis for appellees' conclusions that the gas here moves in a continuous flow from the mouths of the wells in interstate commerce. The same reasoning could send the interstate commerce label down the well and into subterranean chambers where the movement of gas actually commences. The mouth of the well is merely an arbitrary point along the road traveled by the gas. There is no legal reason known to us for fixing the mouth of the well as the dividing line separating State and Federal jurisdictions in matters of commerce and taxation.

It is the nature of gas, since it is lighter than air, to move when relieved of pressure. Stationary gas has no utilitarian value. Such value is attained only when gas moves in a steady and continuous flow. Nor can gas be economically stored except in its natural reservoirs. The movement of gas has no necessary relation to interstate commerce or to commerce at all. It moves, willy nilly, if not contained.

A similar problem was solved by the Court in *Utah Power and Light Co. v. Pfof*¹⁹ where it was held that generation of electricity was a local activity not inseparably related to its transmission, the Court saying:

“While conversion and transmission are substantially instantaneous, they are, we are convinced, es-

¹⁹ 286 U.S. 165, 76 L. ed. 1038.

sentially separable and distinct operations. The fact that to ordinary observation there is no appreciable lapse of time between the generation of the product and its transmission does not forbid the conclusion that they are, nevertheless, successive and not simultaneous acts."

Here there is contractual interference with the transmission of the gas in interstate commerce until after the gas has emerged from processing plants as well as actual interference caused by the processing itself.²⁰ That there is no appreciable lapse of time between processing of the gas, the taking or retaining of the gas and its transmission is, as we have seen, unimportant since they are successive and not simultaneous acts.

We believe that the tax levied by this statute is fairly commensurate with the protection and benefits conferred by the State upon those engaged in the occupation described. We also believe that this statute represents an exercise of legislative discretion with which the Constitution of the United States does not require and the courts should not command interference. The statute, to us, seems to reflect a sincere effort on the part of the Legislature to deal fairly and justly with the State, its citizens and with all others who share in the enjoyment of one of the great though vanishing, exhaustible and irreplaceable natural resources of the State of Texas.

In passing upon the question before us we have borne in mind the admonition of Chief Justice Marshall that:

"The question, whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The mindful of the solemn obligations which that station

²⁰ In *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 67 L. ed. 929, the Court said: "The ore does not enter interstate commerce until after the mining is done. . . ."

court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unimposed. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."²¹

We have no clear or strong conviction that this statute and the Constitution are incompatible.

The statute does not purport to, was not designed to and in fact does not interfere with the authority of Congress to regulate interstate commerce.

All that truthfully can be said of the statute is that it increases the cost of gas to the consuming public. There are few if any ad valorem, privilege or excise taxes which do not have similar effect in their respective fields. This, however, is not a defect.

The taxable event described by the statute, as to Michigan-Wisconsin, occurs between processing conducted by Philips and further processing done by Michigan-Wisconsin in the State of Texas, all prior to the time that the gas is finally committed to its interstate journey. Such event, that is the taking or retaining of the gas at the gasoline plant outlet, is just as local in nature as the production itself is local. The judicial consequences in each instance should be the same. We believe they are the same.

It follows that, in our opinion, the statute is valid.

The judgment in each of these cases is reversed and judgments are here rendered that the respective plaintiff therein take nothing by its suit.

ROBERT G. HUGHES,
Associate Justice.

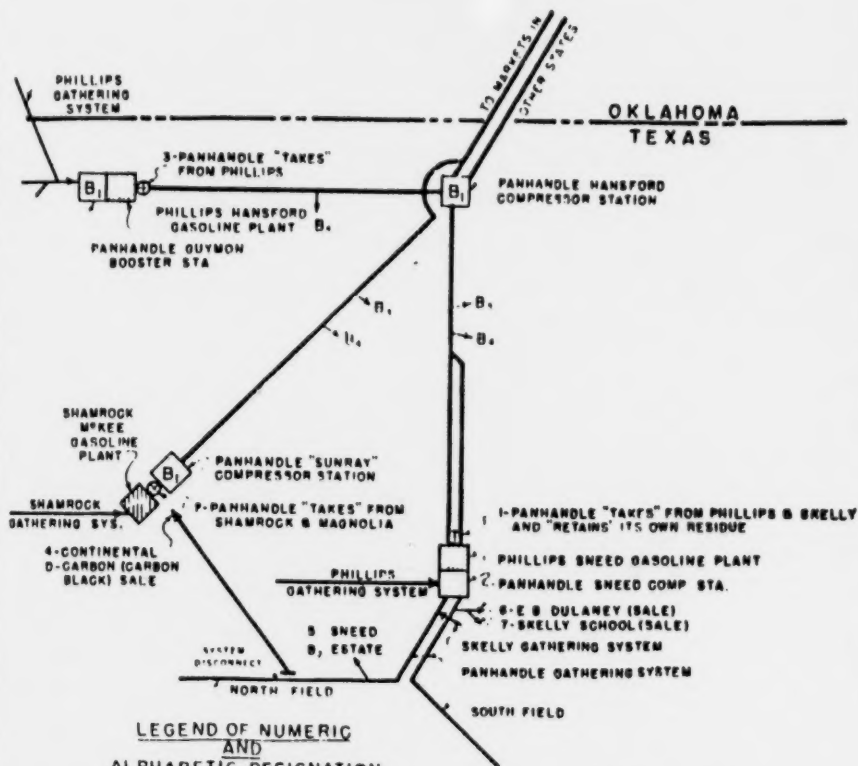
Reversed and rendered. Filed: February 4, 1953.

²¹ *Fletcher v. Peck*, 6 Cranch 87, 3 L. ed. 162.

(Here follow 2 photolithographs)

"APPENDIX B" to Opinion

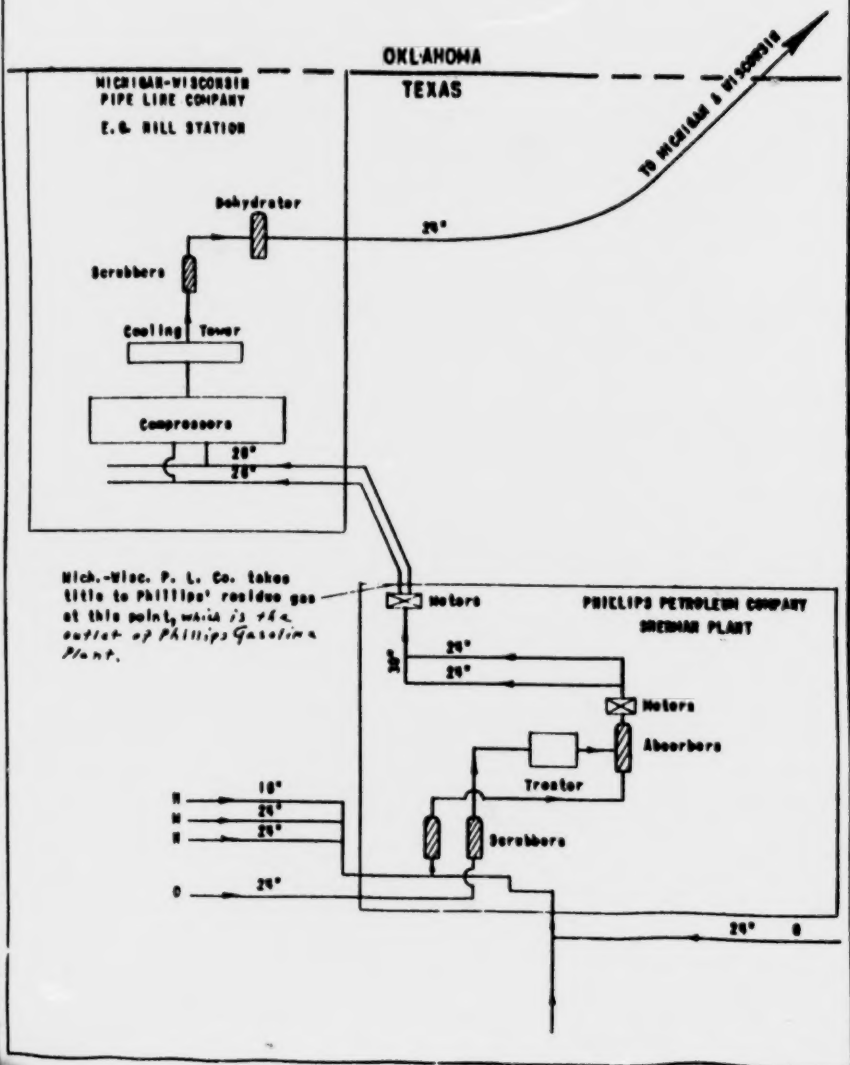
PANHANDLE EASTERN PIPE LINE COMPANY GATHERING AND TRANSMISSION SYSTEM IN STATE OF TEXAS



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SCHEMATIC LAYOUT

MICHIGAN-WISCONSIN PIPE LINE COMPANY - PHILLIPS PETROLEUM COMPANY





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APPENDIX "B"

COPY OF SECTION XXIII, H. B. 285, CHAPTER 402,
ACTS OF THE 52ND LEGISLATURE OF TEXAS,
1951 (V.A.C.S. 7057f)

*Art. 7057f. Occupation Tax on Business of Gathering Gas
Definitions*

Section 1. The provisions of Texas Revised Civil Statutes (1925) Articles 10, 11, 12, 14, 22 and 23 and Texas Laws 1947, Chapter 359,¹ on the interpretation of Statutes shall apply specifically to this Section. In addition to these standard definitions, in this Section, unless the context otherwise requires:

(a) "Gas" means natural and casinghead gas or other gas taken from the earth or waters, regardless of whether produced from a gas well or from a well also productive of oil, distillate, condensate or other product.

(b) "Casinghead gas" means any gas or vapor indigenous to an oil stratum and produced from such stratum with oil.

(c) "Gathering gas" means the first taking or the first retaining of possession of gas produced in Texas for transmission whether through a pipe line, either common carrier or private, or otherwise after severance of such gas, and after the passage of such gas through any separator, drip, trap, meter or other method designed to separate the oil therefrom. In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term "gathering gas" means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipe line, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant.

(d) "Gatherer" means any person engaged in the gathering of gas.

¹ Article 23a.

(e) "Person" means and includes any person, firm, concern, receiver, trustee, executor, administrator, agent, institution, association, partnership, company, corporation, and persons acting under declarations of trust, as well as trustees acting under declarations of trusts.

(f) "Cubic foot of gas" or "standard cubic foot of gas" shall have the definition ascribed thereto by Texas Laws, 1949, Chapter 519, Section 4, Texas Revised Civil Statutes (Vernon, 1948), Article 7047b, Section 2 (12).

Imposition of Tax; Amount; Calculation

Sec. 2. In addition to all other licenses and taxes levied and assessed in the State of Texas, there is hereby levied upon every person engaged in gathering gas produced in this State, an occupation tax for the privilege of engaging in such business, at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered.

In determining the quantity of the gas for the purposes of calculating such tax, there shall be excluded (a) gas produced and then lawfully injected into the earth of this State; (b) gas used for fuel in connection with lease or field operations; (c) gas lawfully vented or flared; and (d) gas used in the manufacturing of carbon black.

Payment; Penalty for Delay

Sec. 3. The tax levied hereby shall be paid by the gatherers on the 25th day of each month on all gas gathered in the State during the next preceding thirty (30) days prior to the first day of the month in which payment is required to be made. If such payment is not made within the time prescribed, the amount due shall become delinquent and a penalty of ten per cent (10%) of the amount of the tax shall be added and such tax and penalty shall bear interest at the rate of six per cent (6%) per annum from date until paid.

Unlawful to Require Producer to Pay

Sec. 4. The tax imposed by this Act is a tax on the occupation of gathering gas and not on the production of gas; therefore, it shall be unlawful for any gas gatherer to require any producer to pay the tax imposed under this Act under any

contract provision between the producer and the gas gatherer allowing the gatherer to deduct from sums owed the producer amounts paid by the gatherer by reason of the imposition of a tax on production.

Records and Reports; Rules and Regulations

Sec. 5. It shall be the duty of each gatherer of gas in this State to keep accurate records within this State of all gas gathered and showing also what disposition is made of same, and to make reports to the Comptroller of Public Accounts of gas gathered upon forms prescribed by the Comptroller of Public Accounts. The Comptroller shall prescribe forms of reports to be made by such gatherers and to require that such reports be made on officially prescribed forms.

The Comptroller of Public Accounts shall have the power to prescribe such rules and regulations, and require such records and reports as may be needed to aid in the administration and enforcement of the Act.

Examinations and Investigations; Appropriations for Administration and Enforcement

Sec. 6. The Comptroller shall employ auditors and technical assistants for the purpose of verifying reports and investigating the affairs of gatherers to determine whether the tax is being properly reported and paid. He shall have the power to enter upon the premises of any taxpayer liable for a tax under this Act, and any other premises necessary in determining the correct tax liability, and to examine, or cause to be examined, any books, or records, of any person, subject to a tax under this Act, and to secure any other information directly or indirectly concerned in the enforcement of this Act, and to promulgate and enforce, according to law, rules and regulations pertinent to the enforcement of this Act, which shall have the full force and effect of law. Before any division or allotment of the occupation tax collected under the provisions of this Act is made, one fifth ($\frac{1}{5}$) of one per cent (1%) of the occupation tax paid monthly as may be needed in such administration and such enforcement is hereby appropriated for such purpose.

Delinquency; Injunction

Sec. 7. In the event any gas gatherer in this State shall become delinquent in the payment of the proper taxes herein imposed, or fails to file required reports with the Comptroller, the Attorney General by a suit in the name of the State of Texas shall have the right to enjoin such person from gathering gas until the delinquent tax is paid or said reports are filed, and the venue of any such suit for injunction is hereby fixed in the county where the offense occurs.

Violations; Lien; Ascertainment of Amount Due; Gas Audit Fund; Suits

Sec. 8. If any person shall violate any of the provisions hereof, he shall forfeit to the State of Texas as a penalty not less than Twenty-five Dollars (\$25) for each violation and each day's violation shall constitute a separate offense. The State shall have a prior lien for all delinquent taxes, penalties, and interest on all property and equipment used by the gatherer of gas in his business of gathering gas, and if any gatherer of gas shall fail to remit the proper taxes, penalties, and interest due, or any of them, the Comptroller may employ auditors or other persons to ascertain the correct amount due, and the gatherer of gas shall be liable, as an additional penalty, for the reasonable expenses or the reasonable value of such services of representatives of the Comptroller, incurred in such investigation and audit; provided, that funds collected for audits and examinations shall be placed in a gas audit fund in the Treasury and shall constitute a revolving fund which may be used from time to time by the Comptroller in making such audits in addition to the general appropriation made for such purpose, and all of said funds to be placed in said gas audit fund are hereby appropriated for such purpose. The Attorney General shall file suit in the name of the State of Texas for all delinquent taxes, penalties, and other amounts due, and for the enforcement of all liens under this law; and the venue of any such suit is hereby fixed in Travis County.

Reports and Audits as Evidence; Sale or Transfer of Agreements

Sec. 9. (a) If any person liable for the payment of the tax hereby levied, or required to remit the same to the Comptroller of Public Accounts, fails or refuses to pay any tax, penalty, or interest within the time and manner provided by the Act and it becomes necessary to bring suit or to intervene in any manner for the establishment or collection of said claim in any judicial proceedings, any report filed in the office of the Comptroller by such gatherer or representative of said gatherer or a certified copy thereof certified to by the Comptroller showing the amount of gas gathered on which tax, penalties or interest have not been paid, or any audit made by the Comptroller or his representative from the books of said gatherer when filed and sworn to by such representative as being made from the records of said gatherer, such report or audit shall be admissible in evidence in such proceedings and shall be prima-facie evidence of the contents thereof; provided, however, that the incorrectness of said report or audit may be submitted in evidence only against the party by or from whom it was made.

(b) In the event the Attorney General shall file suit of claim for taxes, provided for in the foregoing, and attach or file as an exhibit any report or audit of said gatherer, and an affidavit made by the Comptroller or his representative that the taxes shown to be due by said report or audit are past due and unpaid and that all payments and credits have been allowed, then unless the party resisting the same shall file an answer in the same form and manner as required by Article 3736, Revised Civil Statutes of Texas of 1925, as amended by Chapter 239, Acts of the Regular Session of the Forty-second Legislature, said audit or report shall be taken as prima-facie evidence thereof, and the proceedings of said Article are hereby made applicable to suits to collect taxes hereunder.

(c) When any contract or agreement of gathering gas changes hands, the old gas gatherer shall note on his last report that said contract, or agreement has been sold or transferred, showing the effective date of said change and the name and address of the person who will gather gas

under said contract, or agreement and be responsible for the filing of reports provided for in this Act, and the new gas gatherer shall note on his first report that said contract, or agreement has been acquired, showing the effective date of said change and the name and address of the person formerly gathering gas under said contract, or agreement.

Disposition of Collections

Sec. 10. All moneys derived from and collected by the State of Texas, under the provisions of this Act, less one-fifth ($\frac{1}{5}$) of one per cent (1%) as provided for in Section 6 hereof, shall be deposited in the State Treasury, in the proportion as follows: one-fourth ($\frac{1}{4}$) of the same shall go to and be placed to the credit of the Available Free School Fund; the remaining three-fourths ($\frac{3}{4}$) shall go to and be placed to the credit of the General Revenue Fund.

Invalidity as to Interstate Transmission; Effect

Sec. 11. In the event the tax levied by this Section is declared unconstitutional or invalid by a court of competent jurisdiction as to gas gathered for interstate transmission, the tax shall not be levied as to gas gathered for intrastate consumption. *Acts 1951, 52nd Leg. p. 695, ch. 402, § XXIII.*

Emergency, Effective Sept. 1, 1951.

(9997)

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MILWAUKEE

ROBERT S. GARDNER

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN

STATEMENT AS TO CIRCUMSTANCES

J. H. GARDNER
Attorney at Law
R. L. GARDNER
Attorney at Law
J. H. GARDNER
Attorney at Law
J. H. GARDNER
Attorney at Law
GARDNER & GARDNER

CULSON, MORRIS, BERRIN &
WHITE,
LOCKY, CLARK & MOOREHEAD,
SNEY, AUSTIN, BURGESS &
SMITH,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 199

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
Appellant,

vs.

ROBERT S. CALVERT, ET AL.,
Appellees

APPEAL FROM THE SUPREME COURT OF TEXAS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant, Michigan-Wisconsin Pipe Line Company (hereafter sometimes referred to as "Michigan-Wisconsin") submits its statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the order and judgment of the Supreme Court of Texas in which that Court refused to issue a writ of error to the Court of Civil Appeal for the Third Supreme Judicial District of Texas for the purpose of reviewing the judgment of such Court of Civil Appeals in Cause No. 10,117 on its docket.

As is explained hereinafter under the heading "Jurisdiction," this appeal from the Supreme Court of Texas is taken as a precaution, in the alternative to an appeal which is being taken concurrently with this appeal from the Court of Civil Appeals for the Third Supreme Judicial District of Texas from the judgment entered by such Court of Civil Appeals in such Cause No. 10,117.

Opinion Below

Neither the trial judge nor the Supreme Court of Texas filed an opinion. The opinion of the Court of Civil Appeals is reported at 255 S. W. 2d 535, and a copy is attached hereto as Appendix A.* A copy of the order of the Supreme Court of Texas refusing writ of error is attached as Appendix C.

Question Presented

Whether a so-called occupation tax imposed by the State of Texas upon interstate natural gas pipeline companies for the privilege of receiving gas into their pipelines within the state for immediate transportation in interstate commerce and measured by the volumes of gas so received into such pipelines may stand consistently with the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States.

Statute Involved

H. B. 285, Chapter 402, page 740, Acts of the 52nd Legislature of Texas (1951), is an "omnibus" tax bill containing provisions relating to taxes of many kinds, only one section of which—Section XXIII of the Act¹—is here involved. A copy of Section XXIII is attached hereto as Appendix

* (Clerk's Note. This opinion is printed as Appendix "A" to the Statement as to Jurisdiction in No. 198 and is not reprinted here.)

¹ Article 7057f, Vernon's Annotated Civil Statutes of Texas (V.A.C.S.).

B,* and the portions that are of special significance here, Subsection 2 and the second sentence of Subdivision (c) of Subsection 1, are here quoted:

Subsection 2 is as follows: (Omitting certain exemptions therein contained that are not here pertinent)

“In addition to all other licenses and taxes levied and assessed in the State of Texas, there is hereby levied upon every person engaged in gathering gas produced in this State, an occupation tax for the privilege of engaging in such business, at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered.”

The second sentence of Subdivision (c) of Subsection 1 of such Section XXIII is as follows:

“In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term ‘gathering gas’ means the first taking or the first retaining of possession of such gas for other processing or transmission, whether through a pipeline, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant.”

Statement

Michigan-Wisconsin is a natural gas pipeline company holding certificates of convenience and necessity issued by the Federal Power Commission under the Natural Gas Act, 15 U. S. C., Sec. 717 et seq. It owns and operates a pipeline transportation system which originates in the Panhandle of Texas, less than two miles from the Oklahoma state line, and terminates at various points in the States of Michigan and Wisconsin. At these points and at other points in

* (Clerk's Note.—This Statute is printed as Appendix “B” to the Statement as to Jurisdiction in No. 198 and is not reprinted here.)

Missouri and Iowa, it sells natural gas to local distribution companies which serve domestic and industrial consumers in those areas. Its sole business is the interstate purchase, transportation and sale of natural gas.

All of the gas transported by Michigan-Wisconsin is purchased by it from Phillips Petroleum Company. That company operates a network of pipelines through which it brings the gas from individual wells or groups of wells to its gasoline plant located adjacent to the mouth of Michigan-Wisconsin's pipeline in Hansford County, Texas. At this plant certain liquefiable hydrocarbons (gasoline and other liquid products) are removed from the gas by Phillips, and remain the property of Phillips.

The remaining natural gas, known technically as "residue gas," flows from the absorbers in the Phillips gasoline plant through pipes owned by Phillips for 300 yards to the boundary between the property owned by that company and that of Michigan-Wisconsin. There, without any break in the flow, the gas enters the interstate pipeline system owned by Michigan-Wisconsin. It is at this point that title to the gas passes from Phillips to Michigan-Wisconsin, and it is this taking or receiving of gas by the latter into its lines which the statute here involved designates as the taxable incident, as will be pointed out in more detail below.

Following the receipt by Michigan-Wisconsin of the residue gas, such gas flows a short distance to a compressor station, where, by raising the pressure of the gas, appellant utilizes the expansion characteristics of the gas as the motive power for further movement along its journey.² From the compressor station in Texas, the gas flows through

² A schematic diagram of the operations just described is attached as Appendix B to the opinion of the Court of Civil Appeals, Appendix A, *infra*, 255 S.W. 2d at 548. (Clerk's Note. This diagram is reproduced as an Appendix to the Statement as Jurisdiction in No. 198 and is not reproduced here.)

appellant's pipeline system 1.74 miles to the Oklahoma border and thence to the consuming markets in other states. Additional motive power for this journey is furnished by 15 other compressor stations which are operated in other states through which the gas is transported. It was stipulated by the parties, and the Court of Civil Appeals found:

"The movement of such gas from the producing wells to points of delivery to Michigan-Wisconsin at the outlet of the Phillips gasoline plant and thence through pipe lines to consumers in Michigan and Wisconsin is a steady and continuous flow. The taking of such gas at the outlet of the gasoline plant is accomplished through facilities owned by Michigan-Wisconsin and used exclusively by it in the taking and transportation of such gas.

"All of the gas is purchased by Michigan-Wisconsin for transportation to points outside Texas, and all of such gas is in fact so transported." Appendix A, *infra*, 255 S. W. 2d at 539.

Section XXIII of H. B. 285, the statute here involved, levies a tax of 9/20 of one cent per thousand cubic feet upon every person engaged in taking possession of gas for transmission by pipeline, "for the privilege of engaging in such business" (Sec. 2). Reduced to its essentials, therefore, the challenged statute levies a tax of 9/20 of a cent per m.c.f. upon Michigan-Wisconsin for the *privilege* of taking possession of natural gas at the inlet of its pipeline for direct, immediate and invariable transportation in interstate commerce.

The taxes levied by Section XXIII were paid by Michigan-Wisconsin under protest, pursuant to the provisions of the statutes of Texas,³ and a suit for their recovery was properly filed against the appropriate state officials in a state district court at Austin, Texas. That Court entered judg-

³ Article 7057b, Vernon's Annotated Civil Statutes.

ment for Michigan-Wisconsin for the full amount of the taxes paid plus interest as provided by statute, holding Section XXIII to be violative of the Commerce Clause of the Constitution of the United States. Upon the State's appeal to the Court of Civil Appeals, that Court reversed the judgment of the district court, holding the statute valid under the Commerce Clause. Following denial of its motion for rehearing, Michigan-Wisconsin filed an application for writ of error in the Supreme Court of Texas, but that Court refused the application and denied motion for rehearing. By this appeal, appellant seeks review of the refusal of the Supreme Court of Texas to grant a writ of error for the purpose of reviewing the order and judgment of the Supreme Court of Texas in which that Court refused to issue a writ of error to the Court of Civil Appeals for the purpose of reviewing the judgment of such Court of Civil Appeals which sustained the validity of Section XXIII as applied to appellant's operations against appellant's claim of unconstitutionality under the Commerce Clause.

Jurisdiction

Appellant's application for writ of error was refused by the Supreme Court of Texas on May 6, 1953, and its motion for rehearing was denied on June 3, 1953. A petition for appeal was presented to the Chief Justice of that Court on June 25, 1953.

The jurisdiction of this Court to review by appeal the decision of the highest court of a state is conferred by Title 28 U. S. C., Sec. 1257(2). In early cases such as *Bacon v. Texas*, 163 U. S. 207 (1896), and *San Antonio & Aransas Pass Ry. Co. v. Wagner*, 241 U.S. 476 (1916), this Court held that, where the Texas Supreme Court denied a writ of error to review the judgment of a Court of Civil Appeals, the latter Court was "the highest court of a state

in which a decision could be had," within the meaning of Title 28 U.S.C., Sec. 1257.

In 1927, there was added to Article 1728 of the Revised Civil Statutes of Texas an amendment which provided that, when the Texas Supreme Court believes that the judgment of a Court of Civil Appeals is a correct one and that the principles of law declared in the opinion of the latter Court are correctly determined, the Supreme Court will refuse an application for writ of error. This same provision has been carried over into Rule 483 of the Texas Rules of Civil Procedure.⁴ Hence, since 1927, the refusal of a writ by the Texas Supreme Court has constituted at least an implied expression with respect to the merits of the decision of the Court of Civil Appeals. This fact affords basis for an argument that decisions in cases such as the *Bacon* and *Wagner* cases, *supra*, are no longer controlling and that, under decisions such as those in *Hetrick v. Lindsey*, 265 U.S. 384, (1924) and *Matthews v. Huwe*, 269 U.S. 262 (1925), whenever the Texas Supreme Court refuses an application for writ of error, that Court is the one from which an appeal or petition for certiorari to this Court should be prosecuted. Cf. *American Railway Express Co. v. Levee*, 263 U.S. 19 (1923).

This question was squarely raised in a motion to dismiss which was filed in connection with the appeal in *United Gas Public Service Co. v. Texas*, 301 U.S. 667 (1937). This court denied the motion, citing, inter alia, *Norfolk & Suburban Turnpike Co. v. Virginia*, 225 U.S. 264 (1912). From such action, it might be inferred that this Court believes that the refusal of a writ by the Texas Supreme Court is not "an affirmance in express terms" within the holding of the *Norfolk* case, with the result that appeals and petitions for certiorari should continue to be prosecuted from the

⁴ A copy of Rule 483 is attached hereto as Appendix D.

Court of Civil Appeals in cases where the Texas Supreme Court has refused writ of error. This inference is strengthened by the fact that in *Lone Star Gas Co. v. Texas*, 304 U.S. 224 (1938), this Court entertained an appeal from a Court of Civil Appeals in a situation in which the Texas Supreme Court had refused a writ. In both the *United* case and the *Lone Star* case, this Court directed its mandate to the Court of Civil Appeals, and this Court stated in such mandate that it had reviewed the judgment of the Court of Civil Appeals.

However, in *Sweatt v. Painter*, 339 U.S. 629 (1950), which was also a case in which the only action by the Texas Supreme Court was the refusal of a writ, this Court directed its writ of certiorari to the Texas Supreme Court rather than to the Court of Civil Appeals. In addition, this Court also directed its mandate to the Texas Supreme Court, and this Court stated in such mandate that the judgment which it had reviewed was the judgment in which the Texas Supreme Court refused the application for writ of error.

The *Sweatt* case is the latest Texas case to come before this Court involving the refusal of a writ of error. In view of the fact that the writ of certiorari in that case was issued to the Texas Supreme Court, appellant feels that it cannot with safety rely upon the prior cases in which appeals and writs of certiorari have come from, or been directed to, the Courts of Civil Appeals. Hence, as a matter of precaution, appellant is filing this appeal from the Supreme Court of Texas in the alternative to the appeal which it is concurrently filing from the Court of Civil Appeals. Precedent for such action is found in *Western Union Telegraph Co. v. Priester*, 276 U.S. 252 (1928). See also Stern and Gressman, *Supreme Court Practice*, p. 165.

Except for formal matters and differences in the discussions of technical jurisdiction, this "Statement as to Juris-

diction'' is identical with that which is filed with the appeal from the Court of Civil Appeals.

Manner In Which Federal Question Was Raised

Appellant challenged the validity of Section XXIII under the Commerce Clause of the Federal Constitution specifically and in detail at every stage of the proceedings in the state courts: In its protests (made concurrently with the monthly payments of the tax), its pleadings in the trial court, its brief and motion for rehearing in the Court of Civil Appeals, and in its application for writ of error and motion for rehearing in the Supreme Court of Texas. The Court of Civil Appeals itself stated in the opinion: "The single question presented for our decision is whether Article 7057f, a revenue statute, . . . as applied to the business activities of appellees, violates the Commerce Clause of the Constitution of the United States. If so it is void, if not it is valid."⁵ This Court will accept the recognition by the Court of Civil Appeals that the constitutional issue was properly raised in the State Courts. *Charleston Federal Savings & Loan Assn. v. Alderson*, 324 U.S. 182, 185 (1945).

The Question Presented By This Appeal Is Substantial

There is but one issue involved in this appeal and that taken by Panhandle Eastern Pipe Line Company in a companion case: Whether the so-called "gathering tax" imposed by the State of Texas upon interstate carriers of natural gas for the *privilege* of receiving such gas into the mouths of their interstate pipelines can stand consistently with the Commerce Clause of the Constitution. The facts are simple, the issue clear cut. Because the supply of natural gas is concentrated so heavily in Texas and a few other states, a tax upon the receipt of such gas by interstate pipe-

⁵ Appendix A, *infra*; 255 S.W. 2d at 537-8.

lines for transportation to the great majority of consumer states has wide and important national repercussions.

The cases now before this Court on appeal were selected by the State of Texas and the pipeline companies as typical test cases through which a conclusive determination of the constitutionality of the "gathering tax" statute as applied to pipeline companies taking gas into their pipelines for transportation to other states could be obtained. Accordingly, all lawsuits initiated by others who paid the tax under protest, of which 117 had been filed as of June 12, 1953, have been stayed pending final decision of the Michigan-Wisconsin and Panhandle Eastern cases and will be affected by such decisions. As of that date also, 15.6 millions of dollars of taxes had been paid under protest, and that amount continues to increase at the rate of one million dollars a month.

It is recognized that the substantiality of an appeal is not measured by dollar amounts or even by the number of cases affected by this Court's decision. Undoubtedly, this Court refuses to entertain many applications for further review which involve large sums of money but which raise frivolous or settled federal questions. That the instant appeals are of quite a different character is significantly indicated by the fact that an able and experienced state trial judge found the statute to be incompatible with the Commerce Clause, and the Court of Civil Appeals was able to say no more than:

"We have no clear or strong conviction that this statute and the Constitution are incompatible." Appendix A, *infra*; 255 S.W. 2d at 546.⁶

⁶ The State Court in effect invited this Court's review of its decision by stating:

"The law will now be inquired into and our conclusions stated as briefly as possible. This we do with full knowledge that the only forum having ultimate and exclusive jurisdiction to authoritatively determine the issue before us is the Supreme Court of the United States."

Appendix A, *infra*; 255 S.W. 2d at 543.

Appellant suggests, however, that the substantiality of this appeal may be judged by a more objective standard—the effect of the statute here involved upon the great national purposes which the Commerce Clause was designed to accomplish. The origins of that clause are to be found, of course, in the commercial warfare between the thirteen original states which began after independence had been won. This Court recently quoted Mr. Justice Story to the effect that during that interval:

“... each State would legislate according to its estimate of its own interest, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view.” Story, *The Constitution*, Sec. 259.

This came “to threaten at once the peace and safety of the Union.” *Id.* § 260.⁷

As will be shown below, the statute here under consideration was passed by the Texas Legislature as a result of a frank and open estimate of the very local interests referred to by Mr. Justice Story. The statute was deliberately aimed at gas moving in interstate commerce; it was designed to produce revenue for the State of Texas by exacting a toll from interstate commerce; and, since, as applied to interstate pipelines, the burden of the tax ultimately will be borne by those persons in other states who consume the gas, the statute enables the State of Texas to achieve the politically popular result of raising revenue at the ultimate expense of citizens of other states. In upholding such a statute, the Court of Civil Appeals disregarded the principles applied in every decision of this Court which is in any way analagous.

⁷ See *Hood v. DuMond*, 336 U.S. 525, 533 (1949).

1. The Background and Purpose of the Statute

The tax here involved is labeled a gas "gathering tax" and purports to be imposed for the privilege of engaging in the occupation of "gathering gas." However, the term, "gathering," has long been used in the gas and oil industry to mean the picking up of gas or oil at individual wells in the field and assembling it at a common point. *Alexander v. Cosden Pipe Line Co.*, 290 U.S. 484 (1934). Michigan-Wisconsin engages in no such activity. Indeed, the Attorney General of Texas stipulated that Michigan-Wisconsin "gathers" no gas within the meaning of that term, as it is consistently used in the gas industry and in ordinary usage.

Thus, what the Texas Legislature did was to take a well-understood term and give it an artificial definition in the statute. "Gathering gas," as there defined, means the "first taking" of possession of gas by a pipeline company "for other processing or transmission" through its pipeline after the gas passes through the outlet of a gasoline plant. It is not Phillips Petroleum Company, the real "gatherer" of the gas in this case, that pays the tax, but Michigan-Wisconsin, which does no more than receive the gas into the mouth of its pipeline for immediate interstate transportation. Of course, the legislature may define its terms as it chooses. Nevertheless, its appropriation of a well-understood term to describe a totally different activity, upon which the tax is imposed, is sufficient alone to justify a suspicion that the tax is one which, in the words of Mr. Justice Brandeis, is "furtively directed" at interstate commerce.⁸

The legislature's purpose was more candidly stated in the report to the House of Representatives by a member of the House-Senate conference committee, who said:

"You will further recall that by practically every vote that was taken here in the House that we have

⁸ *Cudahy Packing Co. v. Hinkle*, 278 U.S. 460, 468 (1929).

shown conclusively that *we want a tax on the gas that leaves the State of Texas*. Your Committee feels that the House still wants that very thing. . . . To be perfectly frank with you, and I have nothing whatsoever to hide, that suggested compromise is a cross between a gathering tax and the Hull-Vick amendment. *It will tax the pipeline gas that goes out of the State of Texas and give as much protection as possible to Texas industries*. . . . You know we have approximately twelve million dollars to raise and you people know that twelve million dollars is a large amount of money and it will vitally affect the ones that have to pay it. . . . I say to you that the issue is now drawn as to whether or not gas piped out of Texas will be taxed or the money will be raised by adding to the already over-taxed landowner, royalty owner and producer. *I believe that the people of Texas want the gas piped out of the State to be taxed.*" House Journal, June 1, 1951, p. 2979. (Emphasis supplied.)⁹

Here, at any rate, there is no subterfuge. In order to raise additional money for state purposes, and at the same time to lessen the over-all tax burden on state residents, the Texas legislature is in effect attempting to levy a tax upon the people of Michigan and Wisconsin, of Ohio, Kentucky, Indiana and a host of other states; and the interstate commerce among the states, which it was the purpose of the Commerce Clause to protect, is the medium by which this shifting of the burden of taxation is sought to be accomplished.

If any further evidence were needed of the purpose of this statute to tax the consumers of gas in other states by a tax on interstate transportation agencies, it may readily

⁹ Of course, the gas that is piped out of Texas is already heavily taxed. The state now levies a production tax amounting to 5.72 per cent of the value of the gas and the producer pays an additional ad valorem tax on the value of his lease and producing facilities. Appellant pays an ad valorem tax on the value of its facilities in the state.

be found in two other provisions of Section XXIII. In the first place, Section 4 makes it unlawful for any "gas gatherer" (i. e. interstate pipeline company) to attempt by contract to shift the tax to a producer. In other words, producers of gas cannot under any circumstances be made to bear the burden of this tax; it must at all events be borne by the pipeline companies and their customers, the consumers.

In the second place, Section XXIII expressly provides in Section 11:

"In the event the tax levied by this Section is declared unconstitutional or invalid by a court of competent jurisdiction as to gas gathered for interstate transmission, the tax shall not be levied as to gas gathered for intrastate consumption."

The greater portion of the natural gas produced in Texas is transported to other states for consumption. The Texas legislature has made it perfectly plain that the purpose of the statute will not be accomplished if it cannot be lawfully applied to gas which moves in interstate commerce.

It is difficult to conceive a clearer case of a tax intended to rest directly upon interstate commerce, or a bolder attempt to make interstate commerce (i. e., the people of other states) bear the burdens of a state's local government.

2. The Effect of the "Gathering Tax" on Interstate Commerce

Every cubic foot of natural gas that leaves the State of Texas is taxed at the rate of 9/20 of a cent per thousand cubic feet. Every gas pipeline company operating lines leaving the state is subject to the tax simply because it "takes possession" of the product within the State for the purpose of transporting it. Obviously, no gas can be transported in interstate commerce unless the carrier first

"takes possession" of it. Obviously, too, the Commerce Clause knows no differences of principle based upon the product involved or the method of its carriage. Thus, if Texas may lawfully tax carriers of gas for the privilege of "taking possession" of that commodity for immediate interstate transportation, Minnesota may clearly tax the owners of ore boats for the privilege of "taking possession" of iron ore at Duluth for immediate transportation to Gary; West Virginia certainly may tax the railroads at so much per ton of coal for the privilege of "taking possession" of that coal for transportation to other states; Michigan would have an equal right to tax the carriers of motor vehicles for the privilege of "taking possession" of those vehicles for transportation throughout the country.

The Commerce Clause was designed to end precisely this kind of impost laid upon commercial intercourse between the states. The tax here involved has exactly the same effect as if Texas had erected custom-houses at points where its highways cross over into other states and was requiring every carrier, upon leaving Texas, to pay a tax on the goods carried, for the privilege of having "taken possession" of those goods within the State. If that kind of tax is to be held valid, custom-houses will certainly spring up on the other side of the State's boundaries in retaliation, and every state may soon be expected to tax heavily the export of those of its products which are most valuable to its neighbors. Cf. *Case of the State Freight Tax*, 15 Wall. 232, 276.

The vice of the present statute is particularly pronounced because of the fact that it concerns a product found in relatively few states but desired in many. From the State of Texas, for example, natural gas flows to some 38 other states. Gas transported by Michigan-Wisconsin alone serves consumers in Missouri, Iowa, Michigan and Wisconsin, and consumers of gas carried by Panhandle Eastern

Pipe Line Company reside in Missouri, Illinois, Indiana, Michigan, Ohio, Pennsylvania and Ontario, Canada. The State of Texas thus has a tremendous leverage which it can exert through a tax upon a product dispersed so widely from a single source. Cf. *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 433-434 (1947).

Another effect upon interstate commerce should be noted, namely, that the tax is related arithmetically to the volume of such commerce. Since the tax is fixed at 9/20 of a cent per m. c. f. of gas of which Michigan-Wisconsin "takes possession" for transportation through its pipeline, and since *all* of the gas so taken moves immediately and directly in interstate commerce, the result is that the tax is measured strictly by the amount of interstate commerce which appellant carries on.

Just as in the cases where a state has taxed the entire gross receipts derived from interstate commerce, the "gathering tax" is measured not only by the amount of business done within the state but by the amount done in other states as well. That is, the 9/20 of a cent per m. c. f. obviously does not attempt to measure the activities carried on by Michigan-Wisconsin within the State of Texas. Appellant pays as much in taxes per unit of volume for the "privilege" of taking possession of gas which it transports a mere 1.74 miles to the Oklahoma line and a thousand miles beyond as is paid by a company which operates a pipeline 500 miles within Texas and only five miles beyond. The words of Mr. Justice Stone, speaking for the Court in *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 439, are therefore applicable *in toto* to the present tax:

"Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state: If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay

a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of multiple burden to which local commerce is not exposed.”¹⁰

Similarly, in the present case, gas transported by a pipeline solely within the State of Texas would be subject to a single tax of 9/20 of a cent per m.c.f., whereas Michigan-Wisconsin would be subject to an additional tax on a comparable fictitious “local activity” in every state through which its pipeline runs. It is nonsense to say that only Texas could lay such a tax because it is the state of origin of the commerce. If Texas may impose a tax upon pipelines for the privilege of “taking or retaining possession” of the gas in Texas for transportation elsewhere, Oklahoma may levy a tax, measured by the entire volumes of gas transported, for “taking or retaining possession” of the gas within that state, or on any other activity within that state which contributes to the interstate movement of the gas—and so may Missouri, Iowa, Michigan and Wisconsin.

The fact that Congress considers the activities of Michigan-Wisconsin and other interstate pipeline companies to be within the sphere of national interest is indicated by the terms of the Natural Gas Act.¹¹ Michigan-Wisconsin could

¹⁰ The Court also noted: “Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; so that the tax, though nominally imposed upon appellant’s activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state *and burdens the commerce in direct proportion to its volume.*” 305 U.S. at 438. (Emphasis supplied)

¹¹ Title 15, U.S.C., Sec. 717 (a).

not have laid a foot of pipe in Texas or elsewhere without first having obtained a certificate of convenience and necessity from the Federal Power Commission, and the rates at which it sells gas to distribution companies at the termini of its line are subject to the Commission's regulation.

In this connection, the sale of gas by Phillips to Michigan-Wisconsin, which is coincident with the "taking" of the gas by appellant under the Texas statute, was the subject of a very recent decision of the Court of Civil Appeals for the District of Columbia. *Wisconsin v. Federal Power Commission*, No. 11,247, decided May 22, 1953. The question there involved was whether the Federal Power Commission, under the Natural Gas Act, has jurisdiction over that sale, or whether it is a part of the actual "gathering" process conducted by Phillips and thus exempt under the terms of Title 15 U.S.C., Sec. 717(b). The Court of Appeals held that the Commission has jurisdiction over such sale under the Act. It is significant for present purposes that the Court and all parties to that litigation, including the Commission itself, agreed that the sale and delivery from Phillips to Michigan-Wisconsin are a sale and delivery in interstate commerce. Thus, there was unanimity in the view that the sale and delivery by which Michigan-Wisconsin is enabled to "take possession" of the gas—the act for which it is taxed by Texas—are a sale and delivery in interstate commerce.

It is submitted that the Texas "gathering tax" is violative of the basic purposes and precepts of the Commerce Clause. It has accomplished what its sponsors desired, namely, to "tax the pipeline gas that goes out of the State of Texas and give as much protection as possible to Texas industries." But purposes of this kind are precisely what the Commerce Clause was designed to prevent.

3. The Decision of the Court of Civil Appeals, Approved by the Refusal of the Supreme Court of Texas to Grant Writ of Error, Is Contrary To This Court's Decisions.

In referring to the decisions of this Court which were cited in the briefs of the parties, the Court of Civil Appeals said, "None of these cases is factually in point," and the Court added that its decision must therefore "turn upon a practical application of basic principles adduced from these authorities to the facts."¹² Insofar as the Court's opinion is capable of rationalization, it appears to rest upon the theory that the taking possession of gas for transportation is a "local activity" separate from interstate commerce and thus not subject to the prohibitions of the Commerce Clause. Aside from the quotation of general statements from certain of this Court's opinions, the Court of Civil Appeals apparently placed sole reliance upon *Utah Power & Light v. Pfof*, 286 U.S. 165 (1932), where the *generation* of electric power was held to be sufficiently separate from its *transmission* to sustain a state tax. Cf. *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

The attempted isolation of a pretended or fictitious "local activity" engaged in by an interstate business as the incident to be taxed has been a favorite but futile device by which attempts have repeatedly been made to circumvent the Commerce Clause. This Court stated in *Nippert v. Richmond*, 327 U.S. 416, 423 (1946):

" . . . If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be

¹² Appendix A, *infra*; 255 S.W. 2d at 543.

subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a State could not be segregated by an Act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the States and necessarily involves 'incidents' occurring within each State through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result."

That the State of Texas did in this case "carve out from what is an entire or integral economic process" a particular phase or incident, which it has labeled as "separate and distinct" or "local" cannot be gainsaid. *Memphis Steam Laundry v. Stone*, 342 U.S. 389, 393 (1952). It is argued that the act of "taking possession" of gas for transmission interstate through a pipeline is separate and distinct from that transmission. How can a carrier possibly transport goods unless it first "takes possession" of them? One can readily visualize *production* of a commodity without transportation, and it is on this basis that taxes on the production of goods for subsequent transportation in interstate commerce have been sustained. *Utah Power & Light Co. v. Pfof*, 286 U. S. 165, 180, 182 (1932); *Hope Natural Gas Co. v. Hall*, 274 U. S. 284, 288 (1927); *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172, 178 (1923).¹³ But is it possible to

¹³ The very distinction which the Court of Civil Appeals refused to recognize is specifically drawn in the *Pfof* case, upon which the state court relied. In that case this Court stated: "We think, therefore, it is wholly inaccurate to say that appellant's entire system is purely a transferring device. On the contrary, the generator and the transmission lines perform different functions, with a result comparable, so far as the question here under consideration is concerned, to the manufacture of physical articles of trade and their subsequent shipment and transportation in commerce." 286 U.S. at 180-181.

visualize the transportation of an article apart from the carrier's taking possession of the article? Under any conceivable view of the economic process of transportation, one is an inseparable, indivisible part of the other.

That, certainly, has always been this Court's view of the process of "taking possession" of goods for interstate commerce. In the so-called "stevedoring cases," *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90 (1937), and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947), this Court struck down state statutes which levied a tax upon the receipts of companies engaged in loading ships for interstate commerce. In its opinion in the earlier case this Court pointed out:

"The business of appellant, insofar as it consists of the loading and discharge of cargoes by longshoremen subject to its own direction and control, is interstate or foreign commerce.

"Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination . . ." 302 U. S. at 92.

And in the *Carter & Weekes* case, this Court said:

" . . . The transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself." 330 U.S. at 427-8.

It is not without significance that the Court of Civil Appeals, in describing Panhandle Eastern's activities, stated that "Panhandle loads its interstate pipeline with gas from the outlets of three gasoline plants. . . ." ¹⁴ It is this

¹⁴ Appendix A, *infra*; 255 S.W. 2d at 539; emphasis supplied.

very act of "loading its pipeline" upon which the State of Texas has placed an occupation tax, despite the fact that this Court has said that interstate commerce, "at the least, begins with loading and ends with unloading."

Similarly, in *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885), this Court struck down a state tax upon a ferry company operating between Philadelphia and Gloucester, New Jersey, saying:

" . . . the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. *Transportation implies the taking up of persons or property at some point and putting them down at another.* A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation." 114 U. S. at 203. (Emphasis supplied.)

This statement is a conclusive answer to the contention that interstate pipeline companies may constitutionally be taxed for the privilege of receiving gas into their pipelines, which is the method by which they "take possession" of the gas. The activity of receiving gas for interstate transportation is not "local" in the sense that it is one that is carved out of the integral economic process of the transportation itself.

Once the gas is "taken" by Michigan-Wisconsin at the mouth of its pipeline, the gas can have but one destination—the ultimate markets in Missouri, Iowa, Michigan and Wisconsin. This is true, first, because the pipeline has no other outlets within (or without) the State of Texas through which gas might be diverted, and, second, because appellant's certificates of convenience and necessity specify points outside of Texas to which and to whom the gas must

be delivered. This case thus presents the ultimate in certainty of interstate destination from the moment Michigan-Wisconsin takes possession of the gas.¹⁵

This case also presents the ultimate in continuity of interstate movement. As indicated above, the parties have stipulated, and the Court below noted:

“The movement of such gas from the producing wells to points of delivery to Michigan-Wisconsin at the outlet of the Phillips gasoline plant and thence through pipelines to consumers in Michigan and Wisconsin is a steady and continuous flow.” (Appendix A, *infra*; 255 S.W. 2d at 539.)

There is no storage here involved, no break, no hesitation, but a continuous even movement into appellant's pipeline, through its compressor station and across the state line.¹⁶

There remains one statement in the opinion of the Court of Civil Appeals about which comment should be made. At the conclusion of its opinion, the Court stated:

“The taxable event described by the statute, as to Michigan-Wisconsin, occurs between processing conducted by Phillips and further processing done by Michigan-Wisconsin in the State of Texas, all prior to the time the gas is finally committed to its interstate journey.” Appendix A, *infra*; 255 U.S. 2d at 546.

Appellant is frankly at a loss to know what “further processing” Michigan-Wisconsin conducts in the State of Texas—or anywhere else. After the gas enters Michigan-Wiscon-

¹⁵ As a matter of fact, the destination of the residue gas purchased by Michigan-Wisconsin from Phillips is fixed from the moment it leaves the wellhead, since Phillips is bound by contract to deliver to Michigan-Wisconsin the residue gas from all wells drilled in acreage “dedicated” to the latter. *Eureka Pipe Line Co. v. Hallanan*, 256 U.S. 265 (1921); *United Fuel Co. v. Hallanan*, 257 U.S. 277 (1921); *Peoples Natural Gas Co. v. Pub. Serv. Com.*, 270 U.S. 550 (1926).

¹⁶ Under circumstances of similar continuity of movement and certainty of destination, this Court had “no doubt” that the movement of gas was in interstate commerce. *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 687 (1947).

sin's lines it goes immediately into a compressor station and thence into appellant's 24-inch line and immediately across the state line into Oklahoma.

If, by "further processing," the Court meant the operation of appellant's compressor station, the statement is without foundation. The only purpose of the compressor station, as this Court knows, is to build up pressure sufficient to move the gas along the pipeline.¹⁷ It supplies the motive power by which interstate commerce is conducted, just as a locomotive, a truck-tractor or a ship's turbine supplies the motive power for those forms of transportation. The Court of Civil Appeals itself noted earlier in its opinion:

"The taking of such gas at the outlet of the gasoline plant is accomplished through facilities owned by Michigan-Wisconsin and used exclusively by it in the taking and transportation of such gas." Appendix A, *infra*; 255 S.W. 2d at 539.

It is familiar law that facilities used in effectuating the interstate movement of goods are themselves in interstate commerce. Referring to the use of such facilities as a "processing" operation cannot change the facts, or the application of the Commerce Clause to the facts.

Moreover, contrary to the assertion of the Court below, the gas is "committed" to interstate commerce before it enters the compressor station in every conceivable sense of the word. It can go nowhere else, physically or contractually, from the moment it enters Michigan-Wisconsin's lines at the outlet of the Phillips gasoline plant. *Hughes Bros. Timber Co. v. Minn.*, 272 U.S. 469, 475-6 (1926). It does so invariably, unceasingly, unhesitatingly. How the gas could

¹⁷ In *Interstate Natural Gas Co. v. Federal Power Commission* (Note 15 *supra*), this Court stated that "the increase of pressure in the compressor stations must be regarded as merely an incident in the interstate commerce rather than as its origin." 331 U.S. at 689.

be more firmly "committed to interstate commerce" than is the case when appellant takes possession of the gas from Phillips is quite beyond comprehension.

Conclusion

Appellant respectfully suggests that enough has been presented to demonstrate that this appeal, and that filed by Panhandle Eastern Pipe Line Company in a companion case, bring before this Court a question under the Commerce Clause that is far reaching and important, both in terms of legal principles and of practical impact upon the consumers of gas throughout the nation.

In order to "tax the pipeline gas that goes out of the State of Texas," (House Journal, June 1, 1951, p. 2979), the state legislature has conjured up a fictitious name and a fictitious "local activity" upon which to impose the tax. The residents of the consuming states had no voice in that determination. But they had spoken over 150 years ago when their representatives drafted a Constitution which provided that no state may take any action which has the effect "of impeding the free flow of trade between the States." *Freeman v. Hewit*, 329 U.S. 249, 252 (1946). Judged by that standard, Section XXIII of H.B. 285, the Texas "gathering tax" statute, cannot stand.

Respectfully submitted,

D. H. CULTON,
EVERETT L. LOONEY,
R. DEAN MOORHEAD,
ARTHUR R. SEDER, JR.,
S. A. L. MORGAN,
Counsel for Appellant.

CULTON, MORGAN, BRITAIN & WHITE,
LOONEY, CLARK & MOORHEAD,
SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel.

EXHIBIT "C"

IN THE SUPREME COURT OF TEXAS

From Travis County, Third District

May 6, 1953.

No. 4089

MICHIGAN-WISCONSIN PIPE LINE CO.

vs.

ROBERT S. CALVERT et al.

This day came on to be heard the application of petitioner for a writ of error to the Court of Civil Appeals for the Third District and the same having been duly considered, it is ordered that the application be refused; that the applicant, Michigan-Wisconsin Pipe Line Co., pay all costs incurred in this application.

June 3, 1953.

(No. A-4089)

The motion for rehearing herein having heretofore been submitted to the Court and after due consideration of same, it is ordered that the said motion be, and is hereby, overruled.

APPENDIX "D"

RULE 483, TEXAS RULES OF CIVIL PROCEDURE

Rule 483. *Order on Application for Writ of Error*

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused." In all cases where the Supreme Court is not satisfied that the opinion of the Court

of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation "Refused. No Reversible Error." In all cases where the Supreme Court is without jurisdiction of the case as presented in the application it will dismiss the application with the docket notation, "Dismissed for want of jurisdiction."

Provided, that in cases of conflict named in Subdivision 2 of Art. 1728 of the Revised Civil Statutes of Texas, 1925, the Supreme Court may, in its discretion, refuse the writ of error where the court is in agreement with the decision of the Court of Civil Appeals in the case in which the application is filed; and in cases of such conflict with a previous opinion of the Supreme Court, the Supreme Court may, in its discretion, without the necessity of granting the writ and hearing the case, reverse and remand the same on the application for writ of error. *As amended by order of Oct. 10, 1945, effective Feb. 1, 1946.*

(9998)

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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1953

Nos. 198, 199

MICHIGAN-WISCONSIN PIPE LINE
COMPANY,

Appellant

vs.

ROBERT S. CALVERT, ET AL.,
Appellees

Nos. 200, 201

PANHANDLE EASTERN PIPE LINE
COMPANY,

Appellant

vs.

ROBERT S. CALVERT, ET AL.,
Appellees

*Appeals by each Appellant from Both the Supreme Court
of Texas and the Court of Civil Appeals for the
Third Supreme Judicial District of Texas*

**BRIEF IN OPPOSITION TO MOTIONS TO
DISMISS OR AFFIRM**

As permitted by Rule 7 of the Rules of this Court,
Michigan-Wisconsin Pipe Line Company, appellant
in Nos. 198 and 199 and Panhandle Eastern Pipe

Line Company, appellant in Nos. 200 and 201, submit herewith their joint brief in opposition to identical Motions to Dismiss or Affirm filed in behalf of the officials of the State of Texas who are appellees in said causes.

I.

The Jurisdictional Question

Appellees take no position as to whether appellants' appeals are properly from the Supreme Court of Texas or from the Court of Civil Appeals. Their motions to dismiss both appeals are based wholly upon the merits of the controversy, and they ask, in the alternative, that this Court affirm the decrees of *both* the Supreme Court and the Court of Civil Appeals.

For that reason it is respectfully suggested that a determination of the question of jurisdiction be postponed to consideration of the merits so that appellees may have an opportunity to state their position as to whether, in cases where the Supreme Court of Texas refuses a writ of error, an appeal is properly taken from that Court or from the Court of Civil Appeals.

II.

The Merits of the Controversy

1. The Tax is Laid upon the Privilege of Engaging in Interstate Commerce.

Appellees, in their Statement Opposing Jurisdiction, fail to address themselves to what is, after all,

the basic issue, namely, what is the effect of the tax upon the interstate transportation of natural gas. Instead, they state baldly:

“The tax in question is not levied upon the privilege of engaging in interstate commerce. . . The tax is placed upon the privilege of engaging in the business of taking or retaining possession of the gas for transmission, a local activity. . .”

In making these statements appellees assume the answer to the question at issue. The entire controversy is whether or not the “taking or retaining possession of gas for transmission” to other states is a “local activity” that can be divorced from the integral economic process of interstate commerce. *Memphis Steam Laundry v. Stone*, 342 U.S. 389, 393 (1952). Appellants demonstrated in their Statement as to Jurisdiction that the “taking possession” of a commodity by a carrier for immediate interstate transportation is obviously and necessarily a part of the transportation itself, and cited decisions of this Court directly to that effect.¹ Appellees have not attempted to show this Court how a carrier can possibly transport goods in interstate commerce without first taking possession of the goods, nor have they attempted to answer this Court’s statements that “the transportation in commerce, at the least, begins with the loading and ends

¹ *E. G. Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947); *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90 (1937); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (1885).

with unloading” and that “Transportation implies the taking up of persons or property at some point and putting them down at another.”²

Appellees incorporate in the first part of their motions a so-called “proposition of law” which, they say, governs this appeal:

“Although a person is engaged solely in interstate commerce, a state may validly levy a non-discriminatory tax upon a *local incident or activity* of the interstate business, which is *separate and apart* from the actual flow of commerce, provided the taxpayer is receiving from the state levying the tax benefits, protection or opportunities which bear a fiscal relationship to the tax.” (Emphasis supplied).

The proviso to this “proposition of law” is surplusage. The remainder of the proposition is undisputed. Appellants fully recognize that a state may validly levy a non-discriminatory tax upon a local activity which is separate and distinct from commerce, even though it is closely related to commerce, both in time and movement. *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 433. Thus, a state may impose a tax on property within a state, measured by its value, even though that property is used exclusively in interstate commerce, and it may, of course, impose a tax on the production of oil, gas or coal, on the generation of electricity, or on the manufacture of merchandise, even though the

² *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 427 (1947).

³ *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203 (1885).

commodity so produced, generated or manufactured is immediately transported to other states. But these activities are complete within themselves and are separate and distinct from the subsequent interstate movement in commerce.

The question here is not whether a state may tax an activity that is separate from commerce. It is whether or not taking possession of gas for immediate transportation to other states (an activity described by the state court as "loading an interstate pipeline") is separate and apart from interstate commerce. This basic issue is not discussed by appellees.

Of course, the fact that the place of taking possession of gas is at the outlet of a gasoline plant has no more significance than the fact that a carrier receives possession of wheat at the spout of an elevator, of cotton at the platform of a compress, of lumber at the outlet of a sawmill, of coal at the chute, of oil and its products at the loading rack, of automobiles at the loading ramp. If the taking possession of gas for immediate transportation to other states is not a part of commerce, but is separate and distinct therefrom, the same would be true of "taking" possession of telegrams for transmission and of taking possession of wheat, cotton, coal, oil and other commodities for transportation. Cf. *Western Union Telegraph Co. v. Texas*, 105 U. S. 460 (1882); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947). If the theory of appellees were sustained, the inevitable result would be to open the flood gates for burdening interstate commerce in all

classes of commodities with "taking possession" taxes,—a thing the Commerce Clause was designed to prevent.

It is a mere play on words to argue that while a state cannot impose a tax for the privilege of *transporting* commodities to other states, yet it can impose such a tax for the privilege of taking possession of commodities *for* such transportation. On that theory there would, in fact, be no protection of interstate commerce afforded by the Commerce Clause. Transportation of commodities is "impossible or futile" unless the thing to be transported is put aboard the carrying facility and taken off at destination.*

2. *Appellees' Discussion of "Benefits, Protection and Opportunities" is not Applicable.*

In a section entitled "Benefits, Protection and Opportunities Afforded by the State of Texas," appellees recite what purport to be advantages accruing to interstate pipeline companies from the general conservation laws of Texas. This recital is apparently an attempt by appellees to bring this case within the following language of Mr. Justice Reed's opinion in *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 96 (1948):

"This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

* *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, 92 (1937).

Appellees' makeshift argument is an afterthought conceived long after the legislature passed the Act. Appellees themselves recognize in their "proposition of law" that, even though a tax is related directly to "benefits, protection or opportunities" received from the state, it is invalid unless it is levied "upon a local incident or activity of the interstate business, *which is separate and apart from the actual flow of commerce, . . .*" (Emphasis supplied).

This was a necessary concession since, as Mr. Justice Reed himself pointed out in a subsequent opinion:

"Notwithstanding the wide latitude for taxation of incidents connected with interstate commerce, see *Memphis Gas Co. v. Stone*, 335 U.S. 80, this Court has never interpreted the commerce clause to allow a state tax upon that commerce itself." *Interstate Pipe Line Co. v. Stone*, 337 U.S. 662, 680.⁵

Thus, before considering the question of "benefits, protection or opportunities," it is first necessary to determine whether the "local activity" taxed, the "taking" of gas by a pipeline company into its line for immediate interstate transportation, is sufficiently separate that it can be carved out from the integral economic process of transport-

⁵ Similarly, in his dissenting opinion in the *Memphis Natural Gas Co.* case, Mr. Justice Frankfurter said:

"... we are all agreed that where the only 'local incident' is the fact of interstate commerce—that the interstate pipeline goes through Mississippi—the tax is necessarily a tax upon the privilege of doing interstate business. *The Commerce Clause put an end to the power of the states to charge for that privilege.*" 335 U. S. 80, at 102 (Emphasis supplied).

ing gas. *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947); *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952).

As pointed out above, appellees have made absolutely no attempt to show how the fictitious "local activity" here involved can be divorced from the interstate transportation itself, nor have they attempted to distinguish the directly analogous cases cited by appellants. Under these circumstances, the issue of what benefits, if any, appellants receive from the State of Texas is wholly irrelevant. The tax is on the privilege of carrying on interstate commerce itself.

Moreover, assuming the issue to be relevant, it is quite apparent that the so-called "gathering tax" is in no way related to any supposed benefits that pipeline companies receive from the State. As was pointed out in the Statement as to Jurisdiction herein, the purpose of Section XXIII of H.B. 285 was frankly and openly to "tax the pipeline gas that goes out of the State of Texas," and the tax was measured not by any estimate of benefits but by the amount of general revenue its proponents thought was needed. As a member of the Committee stated:

"You know we have approximately twelve million dollars to raise and you know that twelve million dollars is a large amount of money and it will vitally affect the ones that have to pay it." House Journal, June 1, 1951, p. 2979.

In presenting their theory that the tax is valid because of certain benefits which appellees assert appellants receive as a result of the laws of Texas,

appellees have disregarded the necessity to which this Court has frequently referred, that the words used in an opinion be read in the light of the facts of the case under discussion. *Armour Co. v. Wankock*, 323 U.S. 126, 133 (1944). This is especially true when considering the limitations imposed by the Commerce Clause on the power of the state to tax. *Freeman v. Hewit*, 329 U.S. 249, 252 (1946). This Court has stated that catchwords and labels

"... are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard."^{*}

The words "benefits, protection and opportunities" have never been considered by this Court as passwords which permit a state to impose a tax for the privilege of engaging in interstate commerce.

Those words may, with reason, be applied to taxes imposed on the right to own property and the right to conduct local activities closely related to but separate from commerce itself, such as manufacturing or production, since those rights are derived from the state. But when gas has lawfully been produced, it, like any other commodity, is a lawful article of commerce; and the right to transport the gas to other states, which necessarily includes the right to take possession of it for such transportation, is not derived from the state. That right arises under and is protected by the Commerce Clause. It may not be taxed by the state, "no matter how specious may be the pretext" for imposing the tax. *Crutcher v. Kentucky*, 141 U.S. 47, 58 (1891).

^{*} *Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937).

The pretext which appellees urge in support of their contentions is specious indeed.

Texas (and also other oil and gas producing states) has adopted the policy of conserving oil and gas. The Texas statute by which that policy was adopted shows on its face that it was enacted for the purpose of preventing waste and protecting the correlative rights of producers (among themselves) by compelling ratable production.⁷ The history of the industry shows that such statutes and regulations issued thereunder are for the protection of producers *against each other* in order that all producers may have an opportunity to produce their fair shares of the total quantity of gas produced from a common pool. Such statutes and regulations have been sustained only because they were enacted and promulgated for that purpose and have that effect. *Champlin Refining Co. v. Corporation Com.*, 286 U.S. 210, 233 (1932); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 69 (1937).

Appellees argue that by the adoption of this conservation program, the State of Texas has "taken" from appellant the "aegis" of the Commerce Clause. That is, indeed, a novel argument. This Court has uniformly held that *only Congress* can remove that shield.

⁷ The "declaration of policy" which is contained in the Texas Conservation Act is as follows:

"In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production." Article 6008, V.A.C.S., Sec. 1.

Apparently, appellees argue that because the state has adopted a gas conservation policy, the economic lives of pipeline companies will be longer than if the state permitted, and the producers elected to commit, waste. That result, however, would be only incidental. If the right to engage in interstate commerce can be taxed by a state because of the circumstance that the state, in order to prevent waste and to protect correlative rights of its local producers, has adopted conservation policies (or any other policies which make the state a favorable one in which to purchase commodities for transportation), the area in which that philosophy could, with equal reason, be urged is almost without limit. Texas and other oil-producing states have similar conservation regulations in order to prevent waste of oil and to protect correlative rights of producers of oil; Texas and other lumber-producing states have stringent regulations for the protection of forests against wanton destruction and for the protection of the correlative rights of those who own such forests; the cotton-producing states have regulations for the elimination of pests and allocations of markets.

But does the circumstance that the state prohibits the waste of oil justify imposing upon those who operate railroads, tankers, trucks and pipelines a privilege tax for the right to take possession of oil and its products, gasoline, kerosene, fuel oil, asphalt, etc., for the purpose of transporting the same to other states? Does the fact that the state adopts a policy of protecting forests justify imposing a tax on railroads, steamships, and trucks for the privilege of taking possession of lumber for transporta-

tion to other states? Can a privilege tax, imposed on the right to take bales of cotton at the compresses or cottonseed oil and cake at the cottonseed oil mills into possession for transportation to other states, be sustained because of the circumstance that, but for the regulations imposed by the state in an effort to control the bollweevil, there would not be as many bales of cotton or as much cottonseed oil or cake available for transportation? If the theory of appellees were approved, a Pandora's box would be opened, and the Commerce Clause would become meaningless.

Appellees refer to the fact that *purchasers* of gas have the "right" to make "nominations" for the purchase of gas. But a purchaser does not obtain gas by making such nominations; nor is he denied the right to purchase gas if he makes no nomination. He is not required to purchase the quantities "nominated" or limited in his purchases to those quantities.

These "nominations" are nothing except estimates of probable purchases, made for the assistance of the Commission in ascertaining the probable demand for gas from the reservoir so that the Commission may allocate the production among the wells producing from the reservoir.* The allowable pro-

* Section 12 of the Texas Conservation Statute (V.A.C.S. 6008) requires the Texas Railroad Commission to determine each month the "lawful market demand" for gas to be produced from a particular gas reservoir and the volume that can be produced therefrom without waste; and then to fix a monthly allowable of gas to be produced. The Commission is then required to allocate the monthly allowable among all wells "so as to give each well its fair share of the gas to be produced from the common reservoir." The sole object of this procedure is to protect the producer.

duction determined through use of these nominations *guarantees* a producer the right to produce a specified quantity of gas; but a nomination does not guarantee a pipeline company the right to purchase a single cubic foot of gas. If a pipeline company is able to obtain the quantity of gas it nominates, this must be accomplished by negotiations with the producers. In view of this, it is considerably less than accurate to aver that the system of nominations confers special benefits upon pipeline companies.

It is immaterial that a member of the Railroad Commission may think that these "opportunities" which purchasers have to "nominate" or estimate the quantities of gas they hope to purchase justifies a tax on the transportation of gas by the purchaser. No question for expertise is presented. This Court has stated in emphatic language that the federal privilege of carrying on exclusively interstate commerce must be kept *free* from state taxation, *Spector Motor Service v. O'Connor*, 340 U.S., at 610; and this is true no matter how specious the pretext may be for imposing the tax. *Crutcher v. Kentucky*, 141 U.S. 47, 58 (1891).

3. *The Cases Cited by Appellees do not Sustain Appellees' Contentions.*

Appellants, in their Statement as to Jurisdiction, cited three cases⁹ in which this Court has made it perfectly clear that loading and unloading an inter-

⁹ *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 427 (1947); and *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203 (1885).

state shipment are not only parts of interstate commerce,—they are parts of interstate transportation, and are not local activities separate from interstate commerce. Those cases are directly in point here, but appellees do not refer to any of them.

In an effort to sustain their contention, appellees cite *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940), *Memphis Natural Gas Co. v. Stone* (the opinion of three Justices in that case), 335 U.S. 80 (1948); *Freeman v. Hewit*, 329 U.S. 248 (1946); and *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951). It is believed that the authors will be surprised to learn that their opinions in those cases are relied on to support appellees' contentions, (a) that loading a pipeline with gas for immediate transportation to other states is a local activity, separate and apart from commerce, and (b) that because a state enacts laws in the interest of producers of gas, the state may impose a tax for the "privilege" of transporting commodities there purchased to other states.

Wisconsin v. J. C. Penney Co., was not even a case involving the Commerce Clause. The only question there was as to the validity, *under the due process clause*, of a tax imposed upon the earnings of the company from intrastate business that were paid out in dividends. The other three cases cited by appellees are Commerce Clause cases in which the principles relied upon by *appellants* were stressed and applied. Indeed, in two of those cases the state tax was held invalid under the Commerce Clause.

In *Spector Motor Service Co. v. O'Connor*, *supra*, the most recent of the cases cited by appellees, the

Court concluded its opinion with the following ringing statement:

"In this field there is not only reason but well established precedent for keeping the federal privilege of carrying on exclusively interstate commerce free from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law—*McCulloch v. Maryland*, 4 Wheat 316, *supra*."¹⁰ (Emphasis supplied).

Appellees would reopen the questions decisively settled against their contentions in the stevedore cases and again in the *Spector* case.

It is submitted that this Court should order these appeals for hearing, reserving the question of jurisdiction to consideration of the merits.

Respectfully submitted,

SIDLEY, AUSTIN, BURGESS &
SMITH

ARTHUR R. SEDER, JR.
11 South LaSalle Street
Chicago 3, Illinois

✓ S. A. L. MORGAN
P. O. Box 2332
Houston, Texas
*Attorneys for Appellant
Michigan-Wisconsin Pipe
Line Company*

¹⁰ 340 U.S., at 610.

✓ EDWARD H. LANGE
1221 Baltimore
Kansas City, Missouri

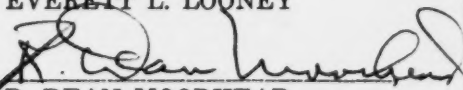
VINSON, ELKINS, WEEMS &
SEARLS

✓ GENE M. WOODFIN
Esperson Building
Houston 2, Texas

✓ CHAS. I. FRANCIS
Esperson Building
Houston 2, Texas
*Attorneys for Appellant
Panhandle Eastern Pipe
Line Company*

LOONEY, CLARK & MOOR-
HEAD

✓ EVERETT L. LOONEY


✓ R. DEAN MOORHEAD
Brown Building
Austin, Texas

CULTON, MORGAN, BRITAIN &
WHITE

✓ D. H. CULTON
American National Bank Bldg.
Amarillo, Texas
Attorneys for both Appellants



MEMORANDUM

ROBERT S. CALVERT

Attorney at Law

For the State of Texas

PANHANDLE RAILROAD COMPANY

ROBERT S. CALVERT

Attorney at Law

APPEALS BY EACH OF THE ABOVE NAMED
COURT OF TEXAS AND THE UNITED STATES
THE THIRD SUPREME COURT

JOINT BRIEF FOR APPEAL

ARTHUR B. BROWN, JR.

EVERETT L. LOOMIS

R. DEAN MORGAN

D. H. COLEMAN

E. A. L. MORGAN

Counsel for Appellants

McAllen, Texas

Filed for Record

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1953

Nos. 198, 199

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
Appellant,
vs.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC
ACCOUNTS, ET AL.,
Appellees.

Nos. 200, 201

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,
vs.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC
ACCOUNTS, ET AL.,
Appellees.

**APPEALS BY EACH APPELLANT FROM BOTH THE SUPREME
COURT OF TEXAS AND THE COURT OF CIVIL APPEALS FOR
THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS**

JOINT BRIEF FOR APPELLANTS

Preliminary Statement

This brief is filed jointly by Michigan-Wisconsin Pipe Line Company (Michigan-Wisconsin), appellant in Nos. 198 and 199, and Panhandle Eastern Pipe Line Company (Panhandle), appellant in Nos.

200 and 201. The appeals in Nos. 198 and 199 are identical except that 198 is from the Court of Civil Appeals for the Third Supreme Judicial District of Texas and 199 is from the Supreme Court of Texas. Nos. 200 and 201 which are appeals by Panhandle are also identical except that 200 is from the Court of Civil Appeals and 201 is from the Supreme Court.

Appeals were taken from both Courts because counsel were uncertain, in view of one of the provisions of the Texas Rules of Civil Procedure, whether the Supreme Court of Texas or the Court of Civil Appeals is "the highest court of a state in which a decision could be had" within the meaning of Title 28, U.S.C., Sec. 1257. Consideration of this procedural question of jurisdiction was, by this Court, postponed to hearing on the merits. The question is discussed in this brief at pages 58 to 61 under the heading "The Jurisdictional Question."

In the trial court, the two cases now on appeal were tried on separate stipulations of fact and the testimony of one witness, which was admitted in both cases. The stipulations were identical in substance except as they described in detail the operations of the respective appellants. While the cases were not consolidated in the state courts, judgments identical in form were entered in each case by the trial court, and both cases were decided by the Court of Civil Appeals in one opinion. The same question of law is presented by both appeals. Believing that a consolidated record will be more convenient than separate records in consideration of the issue involved, counsel for appellants and appellees have stipulated as to

the content of the consolidated record that has been printed.¹

Opinion Below

Neither the trial judge nor the Supreme Court of Texas filed an opinion. The opinion of the Court of Civil Appeals (R. 34) is reported at 255 S.W. 2d 535.

Jurisdiction

Appellants' applications for writs of error to the Court of Civil Appeals were refused by the Supreme Court of Texas on May 6, 1953, and motions for rehearing were denied by that Court on June 3, 1953 (R. 59 and 60). Petition for appeal to this Court in each case was presented to and allowed by the Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas on June 25, 1953 (R. 259 and 265). On that same date petition for appeal in each case was presented to and allowed by the Chief Justice of the Supreme Court of Texas (R. 262 and 267).

By these appeals the validity of a statute of the State of Texas is drawn in question on the ground of its being repugnant to the Constitution of the United States and the final decision below was in favor of its validity. The jurisdiction of this Court

¹ *Amarillo Oil Company v. Calvert et al*, mentioned in the opinion of the Court of Civil Appeals, also was a companion case to the suits by Michigan-Wisconsin and Panhandle in the state courts. The operations of Amarillo Oil Company, however, are exclusively intrastate in character. The Supreme Court of Texas has withheld action on the motion for rehearing in its case pending this appeal (R. 61).

on appeal is conferred by Title 28, U.S.C., Section 1257 (2).

The Question Presented

Whether a so-called occupation tax imposed by the State of Texas upon interstate natural gas pipeline companies for the privilege of receiving gas into their pipelines within the state for immediate transportation in interstate commerce, and, measured by the volumes of gas so received into such pipelines, may stand consistently with the Commerce Clause (Art. I, Sec. 8, Cl.3) of the Constitution of the United States.

Statute Involved

H. B. 285, Chapter 402, page 740, Acts of the 52nd Legislature of Texas (1951), is an "omnibus" tax bill containing provisions relating to taxes of many kinds, only one section of which—Section XXIII of the Act²—is here involved. A copy of Section XXIII is attached hereto as an Appendix, and the portions that are of special significance here, Subsection 2 and the second sentence of Subdivision (c) of Subsection 1, are now quoted:

Subsection 2 is as follows: (Omitting certain exemptions therein contained that are not here pertinent.)

"In addition to all other licenses and taxes levied and assessed in the State of Texas, there is hereby levied upon every person engaged in gathering gas

² Article 7057f, Vernon's Annotated Civil Statutes of Texas (V.A.C.S.).

produced in this State, an occupation tax for the privilege of engaging in such business, at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered."

The second sentence of Subdivision (c) of Subsection 1 of such Section XXIII is as follows:

"In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission, whether through a pipeline, either common carrier or private, or otherwise, after such gas has passed through the outlet of such plant."

Statement of the Cases

(1) Nature and History of the Cases

Separate suits were brought by appellants against the appropriate Texas state officials, appellees herein, in a state district court under the provisions of Article 7057b of Vernon's Annotated Civil Statutes (V.A.C.S.). In its action, each appellant sought a determination that Section XXIII of H. B. 285 is invalid insofar as the statute applies to its operations and sought the recovery of moneys it had theretofore paid and would thereafter pay during pendency of the action, on the ground that the so-called "gathering tax" imposed by Section XXIII of H. B. 285 is violative of the Commerce Clause of the United

States Constitution (Article I, Section 8, Clause 3), as applied to its operations.³

The district court held that Section XXIII is invalid under the Commerce Clause as to gas "gathered" (as that term is defined in the Act) for immediate interstate transportation. Since all of the gas so "gathered" by the respective appellants (with insignificant exceptions in the case of Panhandle) does move immediately and directly in interstate commerce, that court entered judgment in favor of Michigan-Wisconsin and Panhandle, respectively, for all of the taxes paid by them prior thereto (R. 28 and 31).

Upon appeal by appellees to the state Court of Civil Appeals, that court entered separate judgments reversing the judgments of the district court (R. 55 and 55). Appellants duly applied to the Supreme Court of Texas for writs of error, but that court refused such applications and subsequently denied motions for rehearing (R. 59 and 60). Appellants' petitions for appeal, with appropriate accompanying documents, were filed in this Court on July 23, 1953.

(2) Nature of Michigan-Wisconsin's Operations

Michigan-Wisconsin is a natural gas pipeline company holding certificates of convenience and neces-

³ The petitions of the respective appellants were amended from time to time, in accordance with the requirements of the statute, for the purpose of setting up additional payments made under protest subsequent to the filing of the next preceding petitions. The fourth amended petitions filed by appellants (R. 1 and 11) showed the total sums that each had paid under protest through June of 1952.

sity issued by the Federal Power Commission under the Natural Gas Act, 15 U.S.C. Sec. 717, et seq. (R. 103). It owns and operates a pipeline transportation system which originates in the Panhandle of Texas, less than two miles from the Oklahoma state line, and terminates at various points in the States of Michigan and Wisconsin. At these points, and at other points in Missouri and Iowa, it sells natural gas to local distribution companies which serve domestic and industrial consumers in those areas. Its sole business is the interstate purchase, transportation and sale of natural gas. It produces no gas in Texas, gathers (in the real meaning of the word) no gas in Texas, and sells no gas in Texas (R. 104).

All the gas transported by Michigan-Wisconsin is purchased by it from Phillips Petroleum Company under a long term contract. Phillips owns and operates a network of gathering lines through which it brings gas from individual wells or groups of wells to its gasoline plant located adjacent to the inlet of Michigan-Wisconsin's pipeline in Hansford County, Texas. At this plant certain liquefiable hydrocarbons (gasoline and other liquid products) are removed from the gas by Phillips, and remain the property of Phillips (R. 105-109).

The remaining natural gas, known technically as "residue gas," (R. 103) then flows from the absorbers in the Phillips gasoline plant through pipes owned by Phillips a distance of 300 yards to the boundary between the property owned by that company and that of Michigan-Wisconsin. There, without any break in the flow, the gas is metered and enters the interstate pipeline system owned by Michi-

gan-Wisconsin (R. 109). It is at *this* point of entrance into Michigan-Wisconsin's pipeline that title to the gas passes from Phillips to Michigan-Wisconsin, and it is *this* "taking" or receiving of gas by the latter into its pipe line for immediate interstate movement which the statute here involved designates as the taxable incident.

Following the receipt by Michigan-Wisconsin of the residue gas, such gas flows through Michigan-Wisconsin's facilities a short distance to Michigan-Wisconsin's compressor station, where, by raising the pressure of the gas, Michigan-Wisconsin utilizes the expansion characteristics of the gas as the motive power for further movement along its journey⁴ (R. 109). From the compressor station in Texas, the gas flows through Michigan-Wisconsin's pipeline system 1.74 miles to the Oklahoma border, and thence to consumer markets in other states. Additional motive power for this journey is furnished by 15 other compressor stations which are operated by Michigan-Wisconsin in other states through which the gas is transported (R. 104). It was stipulated by the parties (R. 110), and the Court of Civil Appeals found:

"The movement of such gas from the producing wells to points of delivery to Michigan-Wisconsin at the outlet of the Phillips gasoline plant and thence through pipe lines to consumers in Michigan and Wisconsin is a steady and continuous flow. The tak-

⁴ A schematic diagram of the operations just described is attached as Appendix B to the opinion of the Court of Civil appeals (R. 54B), 255 S.W. 2d at 548.

ing of such gas at the outlet of the gasoline plant is accomplished through facilities owned by Michigan-Wisconsin and used exclusively by it in the taking and transportation of such gas.

“All of the gas is purchased by Michigan-Wisconsin for transportation to points outside Texas, and all of such gas is in fact so transported” (R. 39) 255 S.W. 2d at 539.

(3) Nature of Panhandle's Operations

The Court of Civil Appeals recognized in its opinion that, except for minor variations, Panhandle conducts its operations as does Michigan-Wisconsin (R. 40). Panhandle is a natural gas pipeline company, holding certificates of convenience and necessity issued by the Federal Power Commission under the Natural Gas Act, 15 U.S.C., Sec. 717, et seq. (R. 65). Its main pipeline originates near the east boundary of Moore County, Texas, extends thence through portions of the States of Texas, Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio, and has its northern termini in the State of Michigan (R. 66). It “takes or retains,” within the meaning of Section XXIII of H.B. 285, gas into such pipeline at the outlets of three gasoline plants, namely, the Phillips Sneed gasoline plant, the Shamrock McKee gasoline plant and the Phillips Hansford gasoline plant.⁵

Panhandle sells gas to three small customers in Texas in the amount of 146.3 m.c.f. daily which rep-

⁵ A schematic diagram showing these points of taking possession of gas is attached as Appendix A to the opinion of the Court of Civil Appeals (R. 54A) 255 S.W. 2d at 547.

resents only .36 of 1 per cent of the total volumes of gas received into its main pipeline within the State of Texas. Except for those sales, Panhandle sells no gas in Texas from its pipeline, the southernmost point of sale being Kismet, Kansas (R. 66). The principal markets served by Panhandle include gas distribution companies and industrial consumers in the States of Missouri, Illinois, Indiana, Ohio, and Michigan. In the operation of its interstate pipeline transportation system, Panhandle owns and operates 18 compressor stations in various states (R. 66).

At the outlets of the Shamrock McKee gasoline plant and the Phillips Hansford gasoline plant, Panhandle "loads its interstate pipeline" (R. 71-72) with residue gas produced by Shamrock, Phillips and other producers. However, a portion of the gas which Panhandle takes at the Phillips Sneed gasoline plant is gas which Panhandle has produced in Texas, and which it has delivered to Phillips in order that, pursuant to contract between Panhandle and Phillips, the latter may extract liquefiable hydrocarbons (gasoline, etc.) therefrom (R. 68).

The movement of all the residue gas from the outlets of the gasoline plants through Panhandle's pipeline system to its customers in other states is a steady and continuous flow, and the taking of such gas at the outlets of the gasoline plants is accomplished by Panhandle through facilities that are used exclusively in connection with such taking, receiving and transportation (R. 83). When the residue gas enters Panhandle's interstate pipeline at the outlets of the gaso-

line plants, such gas is already committed by contract to sale and delivery to Panhandle for transportation to points in other states (except the small portion thereof which is sold within the State of Texas) (R. 73). The purpose of taking the gas at the outlets of the gasoline plants is solely for interstate transportation to markets in states other than in Texas; and the invariable practice of Panhandle necessarily is to transport such gas in interstate commerce.

The Court of Civil Appeals recognized (R. 40) that the function exercised by Panhandle as to the gas of which it takes possession at the outlets of the three gasoline plants for interstate transportation is the same function as that which is exercised by Michigan-Wisconsin as to the gas of which it takes possession at the outlet of the Phillips gasoline plant involved in Michigan-Wisconsin's case. For this reason, appellants will, in this brief, as did the Court of Civil Appeals in its opinion, use for purposes of illustration the factual situation of Michigan-Wisconsin.

(4) Conservation Laws and Regulations

Certain evidence, by stipulation and the testimony of a member of the Railroad Commission of Texas, was presented by appellees over objection of appellants, apparently to support a theory that "benefits, protection and opportunities" afforded the pipeline companies by the conservation laws and regulations of the State of Texas justify the tax in question. This argument, and the evidence relating thereto, are fully dealt with at pages 45 to 57 of this brief.

Specification of Error

Appellant in each case urges only one assignment of error. The error assigned by Michigan-Wisconsin in No. 198 (the appeal from the Court of Civil Appeals) is as follows:

“The Court of Civil Appeals erred in holding that Section XXIII of H.B. 285, Acts of the 52nd Legislature, is valid under the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States, as applied to appellant’s activities in taking possession of gas for the purpose of immediate transportation of such gas in interstate commerce, and in reversing the judgment of the District Court” (R. 260).

The error assigned by Michigan-Wisconsin in No. 199 is identical except that it refers to the action of the Supreme Court of Texas rather than to that of the Court of Civil Appeals (R. 263). The assignments of error by Panhandle in Nos. 200 and 201 (R. 266; 269) are identical with those of Michigan-Wisconsin in Nos. 198 and 199, respectively.

Summary of Argument

1. The only issue here is whether, notwithstanding the restrictions imposed by the Commerce Clause, the State of Texas may impose a tax (whatever it may be called) for the privilege of receiving gas into interstate pipelines for immediate transportation to other states. Because the supply of gas is concentrated so heavily in Texas and in a few other

states, a tax upon the receipt of such gas by interstate pipelines for such transportation to consumer states has a wide and burdensome impact.

2. The word "gathering" is used in the Act in a fictitious sense. That term has long been used in the gas and oil industry to mean the picking up of gas or oil by pipelines connected with individual wells in the field and assembling it at a common point. In the Act here involved, however, "gathering gas" is defined as meaning the taking possession of gas at the outlet of a gasoline plant for transportation through a pipeline. Thus, what the Texas Legislature did was to take a well-understood term and give it an artificial definition in the statute. At the time possession is taken by appellants, the natural gas has been produced, has been "gathered" in the real sense of the term, and has been separated into its marketable constituents of liquefied hydrocarbons and residue gas at a gasoline plant. It is after these processes have been completed, and at the point where the residue gas flows into appellants' pipelines, that the tax is imposed upon appellants for the privilege of "taking possession" of the residue gas "for transmission through a pipeline."

3. The Act is "furtively directed" at interstate commerce. It is clear, as shown by the legislative history, that the purpose of the Act was to "tax the pipeline gas that goes out of Texas and give as much protection as possible to Texas industries." Subsection 4 of the Act makes it impossible for any pipeline company to attempt by contract to shift the tax to the producer. The tax must, at all events, be borne by the pipeline companies, and, eventually, the con-

sumers. Moreover, it is expressly provided in Subsection 11 of the Act that if the tax levied thereby is held invalid, as applied to gas of which possession is taken for interstate transportation, the tax shall not be levied as to gas for intrastate consumption.

4. It cannot be said that the tax is one in the nature of a tax on property, or one in lieu of a property tax. The tax is not measured by, and has no relation to, the amount or value of property within the state. For receiving possession of the same volume of gas, Michigan-Wisconsin, which has less than two miles of pipeline within the state, must pay the same tax as does a pipeline company which has 500 miles of pipeline within the state.

5. Nor is the tax one in the nature of a charge for the use of facilities provided by the state, or to reimburse the state for expenses of inspection, supervision or regulation. Appellants do not use any facilities provided by the state, and the state imposes no supervision over or regulation of appellants' activities in transporting gas in interstate commerce.

6. The Act shows on its face that it is solely a tax for raising revenue. It provides that, except for $\frac{1}{5}$ of 1 per cent allocated to cover the cost of employment of auditors and technical assistants to verify reports and determine whether the taxes are being properly reported or paid, the tax is to be apportioned $\frac{1}{4}$ to the available school fund and the remaining $\frac{3}{4}$ to the general revenue fund.

7. As applied to appellants, the amount of the tax is measured by and related mathematically to the volumes of gas transported in interstate com-

merce. The tax is thus imposed not only upon the activities of appellants in Texas but "upon the entire interstate commerce service rendered both within and without the state," *Gwin, White & Prince Inc. v. Henneford*, 305 U.S. 434, 439. If Texas may impose a tax upon pipelines for the "privilege" of "taking possession" of gas in Texas for transportation elsewhere, Oklahoma may also levy a tax, measured by the entire volumes of gas transported, for the "privilege" of "taking or retaining possession" of the same gas within that state—and so may each other state through which appellants' pipelines run. The tax thus "burdens the commerce in direct proportion to its volume." *Ibid.*

8. The "loading of a pipeline" for interstate transportation, like the loading of a ship or the loading of a train, is an inseparable, indivisible part of the transportation itself. The state has attempted to carve out of what is an integral or entire economic process, a particular phase or incident which it seeks to tax on the theory that such a phase is "separate and distinct" or "local."

9. Transportation in commerce at the least begins with the loading and ends with unloading. Both are essential parts of the transportation itself, *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90; *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422; *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196. The fact that the place of taking possession of gas is at the outlet of a gasoline plant within a state has no more significance than the fact that a carrier receives possession of wheat at the spout of an elevator, of cotton at the platform of a com-

press, of lumber at the outlet of a sawmill, or of automobiles at a loading ramp. If the theory of appellees were sustained, the inevitable result would be to open the flood gates for burdening interstate commerce in all commodities with "taking possession" taxes.

10. The instant cases show the ultimate in certainty and continuity of interstate movement. The movement of the gas from the points where it is "loaded" into appellants' interstate pipelines to appellants' markets in the states to which they transport gas is a steady and continuous flow. There is no storage involved, no break, no hesitation, but a continuous even movement into appellants' pipelines, and through such pipelines to points in other states. The interstate destinations of the gas are definitely fixed by (1) the physical location of the pipelines, (2) long term contracts and (3) appellants' certificates of public convenience and necessity.

11. Appellees' theory that the tax is justified by the circumstance that the State of Texas has adopted a policy of conserving oil and gas and apportioning production among producers, which it is claimed has conferred "benefits, protection and opportunities" upon appellants, is totally irrelevant to the question whether the tax contravenes the Commerce Clause of the Constitution. The "benefits, protection and opportunities" element is essential to a state's "jurisdiction to tax" under the Due Process Clause, but the question of the validity of a tax under the Commerce Clause "depends upon other considerations of constitutional policy having refer-

ence to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce," *Nippert v. Richmond*, 327 U.S. 416, 424.

12. Even if the "benefits, protection and opportunities" argument were relevant to these appeals, the facts demonstrate that the Texas oil and gas conservation and proration laws and regulations confer no special benefit upon appellants and were enacted for purposes unrelated to the business of appellants. Such laws show on their face, and it was expressly stipulated, that they were not designed to preserve the supply of gas of any particular purchaser for any particular time, but were only designed to prevent waste and to adjust correlative rights of all producers (R. 96). Reliance by appellees upon these laws and regulations thus represents an obvious and contrived attempt to find some justification, long after the statute was passed, for a severe and discriminatory tax upon interstate commerce itself.

ARGUMENT

I.

As Applied to Appellants, the Tax is Invalid since it is Imposed on the Privilege of Engaging in an Activity That is a Part of Interstate Commerce.

There is but one issue involved in this appeal: Whether the so-called "gathering tax" imposed by the State of Texas upon interstate transporters of natural gas for the *privilege* of receiving or "tak-

ing" gas into their pipelines for interstate transportation can stand consistently with the Commerce Clause of the Constitution. The facts are simple, the issue clear-cut. Because the supply of gas is concentrated so heavily in Texas and a few other states, a tax upon the receipt of such gas by interstate pipelines for transportation to the great majority of consumer states has a wide and important impact.

The validity of the statute here involved is to be determined from a consideration of the effect of such statute upon the great national purposes which the Commerce Clause was designed to accomplish. The origins of that clause are to be found, of course, in the commercial warfare between the thirteen original states which began after independence had been won. This Court recently quoted Mr. Justice Story to the effect that prior to the adoption of the Constitution

" . . . each State would legislate according to its own interest, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view." Story, *The Constitution*, Sec. 259.

This came "to threaten at once the peace and safety of the Union." *Id.*, Sec. 260."

As will be shown below, the statute here under consideration was passed by the Texas legislature as a result of a frank and open estimate of the very local interests referred to by Mr. Justice Story. The statute was deliberately aimed at gas moving in interstate commerce; it was designed to produce

⁶ See *Hood v. DuMond*, 336 U.S. 525, 533 (1949).

revenue for the State of Texas by exacting a toll from interstate commerce; it imposes a heavy and effective burden upon such commerce; and, since, as applied to interstate pipelines, the burden of the tax ultimately will be borne by those persons in other states who consume the gas, the statute enables the State of Texas to achieve the politically popular result of raising revenue for local use at the ultimate expense of citizens of other states.⁷

(1) *The Background and Purpose of the Statute*

The tax here involved is labeled a gas "gathering tax" and purports to be imposed for the *privilege* of engaging in the occupation of "gathering gas." However, the term "gathering" has long been used in the gas and oil industry to mean the picking up of gas or oil at individual wells in the field and assembling it at a common point through a network of feeder pipelines, *Alexander v. Cosden Pipe Line Co.*, 290 U.S. 484 (1934). Michigan-Wisconsin engages in no such activity. Indeed, the Attorney General of Texas stipulated that Michigan-Wisconsin

"gathers no gas (within the meaning of that term, as it is consistently used in the gas industry and in ordinary usage) in Texas or elsewhere" (R. 104-105).

Thus, what the Texas legislature did was to take a well-understood term and give it an artificial definition in the statute. "Gathering gas," as there de-

⁷ Cf. *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S., at 433.

fined, means the "first taking" of possession of gas by a pipeline company "for other processing or transmission" through its pipeline after the gas passes through the outlet of a gasoline plant. It is not Phillips Petroleum Company, the real "gatherer" of gas (R. 105), that pays the tax, but Michigan-Wisconsin, which does no more than receive the gas into the inlet of its pipeline system for immediate interstate transportation. Of course, the legislature may define its terms as it chooses. Nevertheless, its appropriation of a well-understood term to describe a totally different activity, upon which the tax is imposed, is sufficient alone to justify a suspicion that the tax is one which, in the words of Mr. Justice Brandeis, is "furtively directed" at interstate commerce.⁸

The legislature's purpose in enacting the statute was more candidly stated in the report to the House of Representatives by a member of the House-Senate Conference Committee, who said, in explaining the Bill:

"You will further recall that by practically every vote that was taken here in the House that we have shown conclusively that *we want a tax on the gas that leaves the State of Texas*. Your Committee feels that the House still wants that very thing . . . To be perfectly frank with you, and I have nothing whatsoever to hide, that suggested compromise is a cross between a gathering tax and the Hull-Vick amendment. *It will tax the pipeline gas that goes out of the State of Texas and give as much protection as possible to Texas industries* . . . You know we have ap-

⁸ *Cudahy Packing Co. v. Hinkle*, 278 U.S. 460, 468 (1929).

proximately twelve million dollars to raise and you people know that twelve million dollars is a large amount of money and it will vitally affect the ones that have to pay it . . . I say to you that the issue is now drawn as to whether or not gas piped out of Texas will be taxed or the money will be raised by adding to the already overtaxed landowner, royalty owner and producer. *I believe that the people of Texas want the gas piped out of the State to be taxed.*" House Journal of the 52nd Session of the Legislature of Texas, Regular Session, June 1, 1951, p. 2979. (Emphasis supplied).⁹

Here, at any rate, there is no subterfuge. In order to raise additional money for state general revenue purposes the Texas legislature is in effect attempting to levy a tax upon the people of Missouri, Iowa, Michigan and Wisconsin, of Illinois, Ohio, Kentucky, Indiana and a host of other states; and the interstate commerce among the states, which it was the purpose of the Commerce Clause to protect, is the medium by which this shifting of the burden of taxation is sought to be accomplished. It is significant that *every penny* of the \$428,523.86 in taxes that Michigan-Wisconsin paid during the 10 months prior to the judgment had come from the pockets of residents of Missouri, Iowa, Michigan and Wisconsin, and that, with trifling exceptions, *every penny* of the \$484,826.86 paid by Panhandle had similarly

⁹ Of course, the gas that is piped out of Texas is already heavily taxed. The state now levies a production tax amounting to 5.72 per cent of the value of the gas and the producer pays an additional ad valorem tax on the value of his lease and producing facilities. Each appellant pays an ad valorem tax on the value of all its facilities in the state (R. 113 and 85).

come from the pockets of residents of states other than Texas during that same period (R. 29 and 32).

If any further evidence were needed of the purpose to tax the consumers of gas in other states by a tax on interstate transportation agencies, it may readily be found in two other provisions of Section XXIII. In the first place, Section 4 (App. p. 65) makes it unlawful for any "gas gatherer" (i.e. interstate pipeline company) to attempt by contract to shift the tax to a producer. In other words, producers of gas cannot under any circumstances be made to bear the burden of this tax; *it must at all events be borne by the pipeline companies* and, eventually, by the consumers.

In the second place, Section XXIII expressly provides in Section 11 (App. p. 70):

"In the event the tax levied by this Section is declared unconstitutional or invalid by a court of competent jurisdiction as to gas gathered for interstate transmission, the tax shall not be levied as to gas gathered for intrastate consumption."

The greater portion of the natural gas produced in Texas and affected by the tax is transported to other states for consumption. The Texas legislature has made it perfectly plain that the purpose of the statute will not be accomplished if the tax cannot lawfully be applied to gas which moves in interstate commerce.

It is difficult to conceive a clearer case of a tax intended to rest directly upon interstate commerce, or a bolder attempt to make interstate commerce (i.e., the people of other states) bear the burdens of a state's local government.

(2) *The "Loading of a Pipeline" With Gas For
Immediate Transportation to Other States
Is a Part of Interstate Commerce, —
Not a "Local Activity" Which is
Separate and Distinct from
Interstate Commerce*

Insofar as the opinion of the Court of Civil Appeals is capable of rationalization, it appears to rest upon the theory that the "taking possession" of gas for transportation is a "local activity" separate from interstate commerce and thus not protected by the limitations on state action imposed by the Commerce Clause. Aside from the quotation of general statements from certain of this Court's opinions, the Court of Civil Appeals apparently placed sole reliance upon *Utah Power & Light Co. v. Pfof*, 286 U.S. 165 (1932), where the *generation* of electric power was held to be sufficiently separate from its transmission to sustain a state tax. Cf. *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

The attempted isolation of a pretended or fictitious "local activity" engaged in by an interstate business as the incident to be taxed has been a favorite device by which attempts have repeatedly been made to circumvent the Commerce Clause. This Court stated in *Nippert v. Richmond*, 327 U.S. 416, 423 (1946):

"... If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to

lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a State could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the States and necessarily involves 'incidents' occurring within each State through which it passes or with which it is connected in fact. *And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired results.*" (Emphasis supplied)

That the State of Texas did in this case attempt to "carve out from what is an entire or integral economic process" a particular phase or incident, which the Court of Civil Appeals apparently has labeled as "separate and distinct" or "local," cannot be gainsaid, *Memphis Steam Laundry v. Stone*, 342 U.S.389, 393 (1952). It is argued that the act of "taking possession" of gas for transmission interstate through a pipeline is separate and distinct from that transmission. How can a carrier possibly transport goods unless it first "takes possession" of them? One can readily visualize *production* of a commodity as distinct from transportation, and it is on this basis that taxes on *production* of goods, energy or minerals for subsequent transportation in interstate commerce have been sustained, *Utah Power & Light Co. v. Pfof*, 286 U.S. 165, 180, 182 (1932); *Hope Natu-*

ral Gas Co. v. Hall, 274 U.S. 284, 288 (1927) ; *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 178 (1923).¹⁰

But is it possible to visualize the transportation of an article apart from the carrier's taking possession of the article? Under any conceivable view of the economic process of transportation, one is an inseparable, indivisible part of the other.

That, certainly, has always been this Court's view of the process of "taking possession" of goods for interstate commerce. In the so-called "stevedoring cases," *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937) and *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U.S. 422 (1947), this Court struck down state statutes which levied a tax upon the receipts of companies engaged in loading ships for interstate commerce. In its opinion in the earlier case this Court pointed out:

"The business of appellant, in so far as it consists of the loading and discharge of cargoes by longshoremen subject to its own direction and control, is interstate or foreign commerce.

"Transportation of a cargo by water is impossible

¹⁰ The very distinction which the Court of Civil Appeals refused to recognize is specifically drawn in the *Pfost* case, upon which the state court relied. In that case this Court stated:

"We think, therefore, it is wholly inaccurate to say that appellant's entire system is purely a transferring device. On the contrary, the generator and the transmission lines perform different functions, with a result comparable, so far as the question here under consideration is concerned, to the manufacture of physical articles of trade and their subsequent shipment and transportation in commerce." 286 U.S. at 180-181.

In each of the present cases, on the other hand, appellant's entire system "is purely a transferring device."

or futile unless the thing to be transported is put aboard the ship and taken off at destination . . .” 302 U.S. at 92.

And in the *Carter & Weeks* case, this Court said:

“ . . . The transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an *essential part* of the safety and convenience of the transportation itself.” 330 U.S. at 427-8. (Emphasis supplied.)

It is not without significance that the Court of Civil Appeals, in describing Panhandle Eastern’s activities, stated that “Panhandle *loads* its interstate pipeline with gas from the outlets of three gasoline plants, . . .”¹¹ It is this very act of “loading” interstate pipelines upon which the State of Texas has placed a privilege tax, despite the fact that this Court has said that “the transportation in commerce, at the least, begins with loading and ends with unloading.”

Similarly, in *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885), this Court struck down a state tax upon a ferry company operating between Philadelphia and Gloucester, New Jersey, saying:

“ . . . the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. *Transportation implies the taking up of per-*

¹¹ (R. 40), 255 S.W. 2d at 539.

sons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation." 114 U.S. at 203. (Emphasis supplied.)

Again, in cases arising under the Export-Import Clause of the Constitution (Article I, Section 10, Clause 2), where the analogous problem arises of determining when the movement in foreign commerce commences, this Court has held that delivery of the commodity to a carrier is an integral part of the commerce itself. In *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 82-83 (1946), for example, this Court said:

"The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. *That delivery marked the commencement of the movement of the oil abroad.* . . . It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. The means of shipment are unimportant so long as the certainty of the foreign destination is plain." (Emphasis supplied.)

Insofar as certainty and continuity of movement are factors in determining when interstate commerce begins, it can be stated categorically that at the moment the gas is "taken" by Michigan-Wisconsin—the moment that the tax is imposed—the gas is *already flowing* toward definitely fixed and certain destinations in Missouri, Iowa, Michigan and Wisconsin. This is true, first, because the pipeline has

no other outlets within the State of Texas through which gas might be diverted, and second, because appellant's certificates of convenience and necessity specify points outside Texas to which the gas must be delivered. This case thus presents the ultimate in certainty of interstate destination even before Michigan-Wisconsin takes possession of the gas. The same is true as to the gas of which Panhandle takes possession for transportation to its markets outside the state.¹²

This case also presents the ultimate in continuity of interstate movement. As indicated above, the parties have stipulated (R. 110), and the Court below noted:

"The movement of such gas from the producing wells to points of delivery to Michigan-Wisconsin at the outlet of the Phillips gasoline plant and thence through pipelines to consumers in Michigan and Wisconsin is a steady and continuous flow" (R. 39).

A similar statement was stipulated as to Panhandle (R. 83).

Thus, there is no storage here involved, no break, no hesitation, but a continuous even movement from

¹² As a matter of fact, the destination of the residue gas purchased by Michigan-Wisconsin from Phillips is fixed from the moment it leaves the wellhead, since Phillips is bound by contract to deliver to Michigan-Wisconsin the residue gas from all wells drilled in acreage "dedicated" to the latter (R. 106). It was also stipulated that all the residue gas purchased by Panhandle at the outlets of the three gasoline plants is committed by contract to sale to Panhandle for transportation to points in other states, except the small quantities sold within the state (R. 73).

the gasoline plants involved into appellants' pipelines, through their compressor stations and across the state line.¹³

Of course, a state may validly levy a non-discriminatory tax upon a true local activity—an activity that is separate and distinct from interstate commerce. But while the Court of Civil Appeals refers to the "gathering" of gas as such a local activity, its recitals and the stipulated facts demonstrate with complete clarity that the incident taxed—the mere receipt by appellants of moving gas into the mouths of their interstate pipelines—is not and cannot be divorced from the economic function which they perform, namely, the interstate transportation of gas.

The principle here involved is in no way limited to oil and gas. Precisely the same factors come into play when a carrier receives possession of wheat at the spout of an elevator, of cotton at the platform of a compress, of lumber at the outlet of a sawmill, of coal at a chute, of automobiles at a loading ramp. If the taking possession of gas for immediate transportation to other states is not a part of interstate commerce, but is separate and distinct therefrom, Minnesota may clearly tax the owners of ore boats for the privilege of "taking possession" of iron ore at Duluth for immediate transportation to Gary; West Virginia certainly may tax the railroads and barges

¹³ Under circumstances of similar continuity of movement and certainty of destination, this Court had "no doubt" that the movement of gas was in interstate commerce, *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 687 (1947). See also *Eureka Pipe Line Company v. Hallanan*, 257 U.S. 265 (1921) and *United Fuel Gas Company v. Hallanan*, 257 U.S. 277 (1921).

at so much per ton for the privilege of "taking possession" of coal for transportation to other states; Michigan would have an equal right to tax the carriers of motor vehicles for the privilege of "taking possession" of those vehicles for transportation throughout the country.

The Commerce Clause was designed to end precisely this kind of impost laid upon commercial intercourse between the states. The tax here involved has the same effect as if Texas had erected custom houses at points where its highways cross over into other states and was requiring every carrier, upon leaving Texas, to pay a tax on the goods carried, for the privilege of having "taken possession" of those goods within the state. If that kind of a tax is held valid, custom houses will certainly spring up on the other side of the state's boundaries in retaliation, and every state may soon be expected to tax heavily the receipt for interstate transportation of those of its products which are most valuable to its neighbors. Cf. *Case of the State Freight Tax*, 15 Wall. 232, 276 (1872).

(3) *The Effect of the "Gathering Tax" Upon Interstate Commerce and Consumers of Gas*

The vice of the present statute is particularly pronounced because:

(a) it is imposed upon the entire volume of interstate commerce and thus taxes appellants' activities outside Texas; (b) it is in purpose and effect a tax upon the residents of other states; and (c) it is aimed specifically at transportation companies. These cir-

cumstances emphasize the pernicious effect of the tax upon interstate commerce, as will be pointed out.

(a) *The "gathering tax" is imposed upon the entire volume of interstate commerce.*

It is at once apparent that the tax here involved is imposed upon the *entire* volume of gas transported interstate. Since the tax is fixed at 9/20 of a cent per m.c.f. of gas of which appellants "take possession" for transportation through their pipelines, and since *all* of the gas so taken (except for insignificant quantities in the case of Panhandle) moves immediately and directly in interstate commerce, the result is that the tax is measured by the total amount of interstate commerce that appellants carry on, both within and without the State of Texas.

In this respect, the tax here involved is precisely the same, in logic and practical effect, as an unapportioned gross receipts tax upon interstate transportation, which this Court has not sanctioned since, at least, 1887. In *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 441 (1939), the Court stated:

"For more than a century, since *Brown v. Maryland*, 12 Wheat. 419, 445, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. (Citations) For half a century, following *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U.S. 326, it has not been doubted that state taxation of local participation in interstate commerce, *measured by the entire volume of the commerce*, is likewise foreclosed." (Emphasis supplied.)

Indeed, while taxes measured by the *volume* of interstate commerce are usually considered as one with gross receipts taxes, this Court at first sustained a state tax upon gross receipts from interstate commerce, *State Tax on Railway Gross Receipts*, 15 Wall. 284 (1872), but in a companion case it struck down a state tax of two to five cents per ton of freight transported by carriers in interstate commerce—the very type of tax here involved, *Case of the State Freight Tax*, 15 Wall. 232 (1872).¹⁴ In the case last cited this Court said:

“The legislature of Pennsylvania has in effect declared that every ton of freight taken up within the State and carried out . . . shall pay a specified tax. The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible.

“If, then, this is a tax upon freight carried between States, and a tax because of its transportation, and if such a tax is in effect a regulation of interstate

¹⁴ The gross receipts tax held valid in the *Gross Receipts* case was distinguished from the tonnage tax on the grounds (1) that the tax, being collectible only once in six months, was laid upon a fund that had become mingled with the general property of the company, and (2) that the tax was upon the franchise of the corporation. The first ground was expressly overruled in *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U.S. 326, 342 (1887), and since that time gross receipts taxes and volume or tonnage taxes have been treated as identical in principle. See also *Fargo v. Michigan*, 121 U.S. 230 (1887).

commerce, the conclusion seems to be inevitable that it is in conflict with the Constitution of the United States." 15 Wall. at 276, 279.

The same question, i.e., the validity of a tax measured by the entire volume of interstate commerce, again arose in *Western Union Telegraph Company v. Texas*, 105 U.S. 460 (1881), where the state had imposed an occupation tax upon telegraph companies at the rate of one cent per full rate message and one half cent for every message at less than full rate. This Court, after referring to the *Case of the State Freight Tax*, *supra*, to cases involving taxes upon carriers of passengers at specific amounts per passenger, and to cases dealing with taxes on vessels according to measurement, held the tax on telegrams invalid, stating:

"The present case, as it seems to us, comes within this principle. The tax is the same on every message sent, and because it is sent, without regard to the distance carried or the price charged. It is in no respect proportioned according to the business done. If the message is sent the tax must be paid, and the amount determined solely by the class to which it belongs. If it is full rate, the tax is one cent, and if less than full rate, one-half cent. Clearly if a fixed tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. As such, so far as it operates on private

messages sent out of the State, it is a regulation of foreign and interstate commerce and beyond the power of the State." 105 U.S. at 465-6.

Just as in the cases cited above, as well as cases where the entire gross receipts from interstate commerce were taxed, the present "gathering tax" is measured not by the amount of business done within the taxing state but by the amount done in *all* states through which the carrier operates. That is, the 9/20 of a cent per m.c.f. obviously does not attempt to measure the activities carried on by Michigan-Wisconsin and Panhandle within the State of Texas. Michigan-Wisconsin pays as much in taxes per unit of volume for the "privilege" of taking possession of gas which it transports a mere 1.74 miles to the Oklahoma line as is paid by a company which operates a pipeline several hundred miles within Texas. The words of Mr. Justice Stone, speaking for the Court in *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 439 (1939), are therefore applicable *in toto* to the present tax:

"Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state: If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk

of a multiple burden to which local commerce is not exposed.”¹⁵

Similarly, in the present case, gas transported by a pipeline solely within the State of Texas would be subject to a single tax of 9/20 of a cent per m.c.f., whereas Michigan-Wisconsin and Panhandle, respectively, would be subject to an additional tax on a comparable fictitious “local activity” in every state through which its pipeline runs. It would be nonsense to say that only Texas could lay such a tax because it is the state of origin of the commerce. If Texas may impose a tax upon pipelines for the privilege of “taking or retaining possession” of the gas in Texas for transportation elsewhere, Oklahoma also may levy a tax, measured by the entire volumes of gas transported, for “taking or retaining possession” of the gas within that state, and so may each other state through which the pipelines run. Moreover, if Texas can impose a tax for the privilege of “loading” the pipeline, Michigan and Wisconsin could impose a tax for the privilege of “unloading” the pipeline. *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 429 (1947).

¹⁵ The Court also noted:

“Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; so that the tax, though nominally imposed upon appellant’s activities in Washington, *by the very method of its measurement* reaches the entire interstate commerce service rendered both within and without the state and *burdens the commerce in direct proportion to its volume.*” 305 U.S. at 438 (Emphasis supplied).

(b) *The "gathering tax" is in purpose and effect a tax imposed for the local benefit of Texas upon residents of other states.*

The tax here involved concerns a product found in relatively few states but desired in many. From the State of Texas, for example, natural gas flows to some 38 other states. Gas transported by Michigan-Wisconsin alone serves consumers in Missouri, Iowa, Michigan and Wisconsin, while consumers of gas carried by Panhandle reside in Kansas, Missouri, Illinois, Indiana, Michigan, Ohio, Pennsylvania and Ontario, Canada. The State of Texas thus has a tremendous leverage which it can exert throughout the nation by means of a tax upon interstate commerce in natural gas at the very source of that commerce.

At present, the tax is in the amount of 9/20 of a cent per thousand cubic feet of gas. This, in itself, reaps tremendous tax payments for the State of Texas from out of state consumers of gas. But there is nothing to prevent that tax rate from being doubled or tripled at the expense of the out of state consumers, and there undoubtedly would be those within the State who would urge just such a course. Since the avowed purpose of the statute is to "tax the pipeline gas that goes out of the State of Texas and give as much protection as possible to Texas industries," (*supra*, p. 20) there are absolutely no safeguards against a wholesale shift of burdens of financing local government from the people of Texas to consumers of gas in other states. It was legislation of this kind about which this Court, in *South Caro-*

lina State Highway Dept. v. Barnwell Bros., 303 U.S. 177, 185-6 (1938), commented:

“The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state.”¹⁶

(c) *The “gathering tax” is aimed specifically at interstate transportation companies.*

In the third place, the tax statute here involved is aimed specifically at transportation companies—carriers of gas by pipeline. The dominating effect of the statute, and the avowed purpose of its sponsors, was to “tax the *pipeline* gas that goes out of the State of Texas” (*supra*, p. 20). The statute thus strikes at the vitals of interstate commerce—at “a transaction forming an unbroken process” of the transportation itself. Cf., *McLeod v. Dilworth*, 322 U.S. 327, 331.

The fact that Congress considers the interstate transportation of natural gas to be within the sphere

¹⁶ This Court further stated in the *Barnwell* case:

“Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.” 303 U.S. at 185 (fn. 2).

of national interest is indicated by the terms of the Natural Gas Act.¹⁷ In this connection, the sales of gas by Phillips to Michigan-Wisconsin and Panhandle which are coincident with the "taking" of the gas by appellants under the Texas statute, were the subject of a very recent decision of the Court of Appeals for the District of Columbia, *Wisconsin v. Federal Power Commission*, 205 F. 2d 706 (cert. denied, November 30, 1953). The Court of Appeals held that the sales and deliveries by which Michigan-Wisconsin and Panhandle are enabled to "take possession" of the gas so purchased—the activity for which they are taxed by Texas—are sales and deliveries in interstate commerce.

(4) *The Incidence of the Tax*

It cannot be said that the tax is one in the nature of a tax on property or one in lieu of a property tax. The tax is not measured by, and has no relation to, the amount or value of property within the state.

Nor can it be said that the tax is one in the nature of a charge for the use of facilities provided by the state, *Sprout v. South Bend*, 277 U.S. 163 (1928), or that it is one imposed for the purpose of obtaining reimbursement of expense of inspection, supervision or regulation, *Ingels v. Morf*, 300 U.S. 290 (1937). Appellants do not use any facilities provided by the state. The state imposes no supervision over or regulation of appellants' activities in transporting gas in interstate commerce, and, therefore, there is no cost of inspection, supervision or regulation to be

¹⁷ Title 15, U.S.C., Sec. 717 (a).

recouped by the state. The costs of administering the conservation laws and regulations are more than recouped by the state through production taxes imposed upon those who produce oil and gas, for whose benefit those laws and regulations are designed. Vernon's Annotated Civil Statutes, Article 6032. Large sums of money are paid into the state's general fund each year after all expenses of administering the conservation laws and regulations have been paid from moneys collected under that production tax (R. 218).

The Court of Civil Appeals recognized that the tax is imposed by "a revenue statute" (R. 35), 255 S.W. 2d, at 537. It could not do otherwise, in view of the disposition required by Sections 6 and 10 of the Act to be made of the sums of money collected thereunder. Section 6 (App., p. 66) provides for the allocation of an insignificant portion of the tax (not more than $1/5$ of 1 per cent) for the employment of auditors and technical assistants "to verify reports and determine whether the tax is being properly reported and paid." Section 10 of the Act (App., p. 70) requires that the remainder of the tax (at least 99.8 per cent of the total) be apportioned $1/4$ to the Available Free School Fund and the remaining $3/4$ to the General Revenue Fund.

That the Act is one for the purpose of raising revenue for general purposes is recognized by appellees in the "Motion to Advance," which they filed in these causes. The primary reason there advanced for an early disposition of the litigation is that:

"An immediate need exists for money to finance a program of drouth relief, an increase in teachers' salaries, public employees' salaries, and the financ-

ing of the Texas eleemosynary institutions. In view of the recent reduction of the Texas oil allowables, the revenue of Texas has been greatly curtailed and an early decision in these cases would be extremely advantageous in determining financial needs *to be supplied by a called session of the Texas legislature.*" (Emphasis supplied.)

Thus, appellees recognize that the purpose of the tax is (just as its sponsor before the House, in effect, stated) to require that consumers of gas in other states bear to a great extent the burden of increasing the salaries of the teachers and public employees in Texas, the financing of the Texas eleemosynary institutions, and the financing of a program of drouth relief within the State of Texas—all to be accomplished by hereafter convening a special session of the legislature for appropriating the money.

The tax is not one imposed against the producer of gas, is not one imposed on the gatherer of gas (as that term is ordinarily used) and is not one on the operator of a gasoline plant (such as Phillips) who separates the produced gas into its marketable constituents of liquefiable hydrocarbons and residue gas. Prior to the time that the residue gas reaches the outlet of the gasoline plant, the raw gas has been produced, gathered to a gasoline plant, and separated into its marketable constituents of liquid hydrocarbons and residue gas (R. 109).

Reduced to its essentials, the challenged statute levies a tax of 9/20 of a cent per m.c.f. upon Michi-

gan-Wisconsin and upon Panhandle for the *privilege* of taking possession of residue gas for direct, immediate and invariable transportation in interstate commerce. The tax has all the earmarks of a privilege tax, and none of the earmarks of a property tax, or one for the recoupment of expenses incurred by the state in supervising or regulating appellants' activities.

The statute expressly states that the tax is "for the privilege of engaging in the business" of "gathering gas," which, as previously explained, is defined as the taking possession of residue gas for transportation at the outlet of a gasoline plant. If it pays the tax, a pipeline company can exercise this "privilege" and operate its business. Conversely, however, the statute makes it the duty of the Attorney General of Texas to enjoin any person who is delinquent in the payment of the tax from engaging in the business of "gathering gas" (App., p. 67). Hence, if a pipeline company does not pay the tax, it can be enjoined from exercising the "privilege" and cannot thereafter engage in the interstate transportation of gas. This aspect of the statute clearly shows that the tax is imposed upon the privilege of engaging in interstate commerce itself since, if the tax is not paid, the State of Texas has arrogated unto itself the power to stop the commerce.

(5) *There is no "Further Processing" of Gas
by Michigan-Wisconsin*

One statement in the opinion of the Court of Civil Appeals deserves brief individual comment. At the

conclusion of its opinion, without explanation of any kind, the Court stated:

"The taxable event described by the statute, as to Michigan-Wisconsin, occurs between processing conducted by Phillips and further processing done by Michigan-Wisconsin in the State of Texas, all prior to the time the gas is finally committed to its interstate journey." (R. 54), 255 S.W. 2d at 546.

Appellants are frankly at a loss to know what "further processing" Michigan-Wisconsin conducts in the State of Texas—or anywhere else. After the gas enters Michigan-Wisconsin's lines it goes immediately into its 24-inch line and across the state line into Oklahoma.

If, by "further processing," the court meant the operation of Michigan-Wisconsin's compressor station, the statement is without foundation. The only purpose of the compressor station, as this Court knows, is to build up pressure sufficient to move the gas along the pipeline.¹⁸ It supplies the motive power by which interstate commerce is conducted, just as a locomotive, a truck-tractor or a ship's turbine supplies the motive power for those forms of transportation, and it performs the same function as does a relay station operated by a telephone, telegraph or power company and a pumping station used by a transporter of oil. The Court of Civil Appeals itself noted earlier in its opinion:

¹⁸ In *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 689, this Court stated that "the increase of pressure in the compressor stations must be regarded as merely an incident in the interstate commerce rather than as its origin."

"The taking of such gas at the outlet of the gasoline plant is accomplished through facilities owned by Michigan-Wisconsin *and used exclusively by it in the taking and transportation of such gas.*" (R. 39), 255 S.W. 2d at 539.

Referring to the use of such facilities as a "processing" operation cannot change the facts, or the application of the Commerce Clause to the facts.

Moreover, contrary to the assertion of the Court below, the gas is "committed" to interstate commerce before it enters the compressor station in every conceivable sense of the word. It can go nowhere else, physically or contractually, from the moment it enters Michigan-Wisconsin's lines at the outlet of the Phillips gasoline plant, *Hughes Bros. Timber Co. v. Minn.*, 272 U.S. 469, 475-6 (1926). (See *supra*, pp. 8-9.) It does so invariably, unceasingly, unhesitatingly. How the gas could be more firmly "committed to interstate commerce" than is the case when Michigan-Wisconsin takes possession of the gas from Phillips is quite beyond comprehension. This commitment to interstate transportation is also true as to the gas of which Panhandle takes possession at the outlets of the three gasoline plants.

(6) *The "Gathering Tax" Violates Basic Policies Underlying the Commerce Clause*

This Court has consistently held, as pointed out in *Spector Motor Service v. O'Connor*, 340 U.S. 602, 610 (1951):

"... there is not only reason but long established precedent for keeping the federal privilege of carry-

ing on exclusively interstate commerce *free* from state taxation." (Emphasis supplied.)

It has been stated time and again that the right to engage in an activity that is a part of interstate commerce is a right that is created and protected by the Commerce Clause, and not by state laws; that a state may not impose a privilege tax as a condition for exercising that constitutional right.

The members of the Court have not always been able fully to agree as to whether a particular tax is one in the nature of a property tax or one on the right to engage in an activity that is a part of interstate commerce. They have not always been able to agree as to whether a particular activity is one that is a part of interstate commerce or a local activity, separate and distinct from interstate commerce, though closely related to such commerce. But the Court has consistently held that the state cannot lawfully impose a tax for the privilege of carrying on an activity that is a part of commerce.

If the state has the right to impose this tax, it has a right to impose a tax for the privilege of receiving telegraph messages for interstate transmission or telephone calls for connection; on the right to receive for interstate transportation freight on a train or truck or cargo on a ship. This field of taxation is one reserved by the Commerce Clause for the federal government, *McLeod v. Dilworth*, 322 U.S. 327, 331. There is no distinction in principle between loading a pipeline and loading a train, truck, steamboat or tanker.

It is a mere play on words to argue that while a state cannot impose a tax for the privilege of *trans-*

porting commodities to other states, yet it can impose such a tax for the privilege of taking possession of commodities for such transportation. On that theory there would, in fact, be no protection of interstate commerce afforded by the Commerce Clause. Transportation of commodities is "impossible or futile" unless the thing to be transported is put aboard the carrying facility and taken off at destination. *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90, 92 (1937).

It is submitted that the Texas "gathering tax" is violative of the basic purposes and precepts of the Commerce Clause. It would accomplish what its sponsors desired, namely, to "tax the pipeline gas that goes out of the State of Texas and give as much protection as possible to Texas industries." But the accomplishment of purposes of this kind is precisely what the Commerce Clause was designed to prevent.

II.

The Enforcement by the State of Conservation Laws and Regulations Does Not Justify Imposition of a Tax for the Privilege of Engaging in Interstate Commerce.

(1) *The "Benefits, Protection and Opportunities" Argument Is Irrelevant to the Issues Raised by These Appeals*

In their Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, appellees sought to defend the "gathering tax" on the ground that enforcement of the Texas oil and gas conservation and proration

laws and regulations confers "benefits, protection and opportunities" upon appellants which justify imposition of the tax here involved. Apparently to support that theory, appellees introduced the testimony of William J. Murray, Jr., a member of the Texas Railroad Commission, whose testimony is set out at length in the opinion of the Court of Civil Appeals (R. 41-46).

Because of the emphasis that appellees have placed upon these repeated references to the supposed "benefits, protection and opportunities" to appellants from Texas laws and regulations, appellants will point out specifically and in detail why this argument by appellees is, on its facts, without foundation. See *infra*, pp. 50 to 57. But even more important, the entire argument, first conceived long after the statute was passed, has no relevance whatever to the only question before this Court, namely, whether a tax upon the privilege of taking possession of gas for immediate interstate transmission can stand consistently with the Commerce Clause.

In their Statement Opposing Jurisdiction (p. 2), appellees set forth what they considered the "proposition of law which governs this appeal" as follows:

"Although a person is engaged solely in interstate commerce, a state may validly levy a non-discriminatory tax upon a local incident or activity of the interstate business, which is separate and apart from the actual flow of commerce, *provided* the taxpayer is receiving from the state levying the tax, benefits, protection or opportunities which bear a fiscal relationship to the tax." (Emphasis supplied.)

Appellants have no quarrel with this statement as an abstract principle. Obviously, if a tax is upon a local incident separate and apart from interstate commerce, a state may lay a tax upon that local incident if it has afforded the taxpayer sufficient "benefits, protection and opportunities" to satisfy the requirements of due process. But the question here, the answer to which appellees have assumed, is whether the incident taxed is separate and apart from that commerce.

The phrase, "benefits, protection and opportunities," had its origin in this Court's opinion in *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940), where the Court, in defining a state's "jurisdiction to tax" in a territorial sense, stated:

"That test is whether property was taken *without due process of law*, or, if paraphrase we must, whether the taxing power exerted by the state *bears fiscal relation to protection, opportunities and benefits* given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." (Emphasis supplied.)

The phrase was used again in *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949), in this context:

"The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' (Citation) *So far as due process is concerned* the only question is whether the tax in practical operation has relation to *opportunities, benefits, or protection* conferred or afforded by the taxing State." (Emphasis supplied.)

As is apparent from these excerpts, the "benefits, protection and opportunities" reasoning is related to the power of the state, *under the Due Process Clause*, to impose a tax upon a particular person or company. It is not, and has never been, a criterion by which to measure the power of the state to tax the privilege of carrying on interstate commerce.

The validity of the Act as tested by the Due Process Clause is not here involved. While appellees' attempt to link the conservation laws and regulations (which have to do with the *production* of oil and gas) to the transportation activities of interstate pipeline companies has no basis in fact, as will be pointed out *infra*, the question raised by appellants in these appeals is whether, granting *arguendo* that there is sufficient relation between the assumed "benefits, protection and opportunities" afforded by Texas to support a tax against appellants in a due process sense, a tax upon interstate commerce itself, measured by the entire amount of that commerce, violates the Commerce Clause. Appellees have thus erected a straw man and have labored mightily to knock it down. But in doing so they have not touched the issue of the validity of the "gathering tax" under the Commerce Clause.

The language of this Court in *Nippert v. Richmond*, 327 U.S. 416, 423-424 (1946) is directly applicable to the effort by appellees to inject due process arguments into a Commerce Clause case:

"It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of

the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an economic sense, have been held inadequate to support the local tax. *But beyond the presence of a sufficient connection in a due process or 'jurisdictional' sense, whether or not a 'local incident' related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce.*" (Emphasis supplied.)

In short, while it is essential to the validity of a tax under the Due Process Clause that the incident selected bear substantial relation to the "benefits, protection and opportunities" afforded by the state, the question whether that incident is a "local incident" separate from the commerce itself "depends upon other considerations of constitutional policy" having reference to the effect of the tax "in suppressing or burdening unduly the commerce." If the incident on which the tax is placed is not a local incident, *separate and apart from commerce*, the state has no power to impose a tax on that incident, regardless of any benefits, protection and opportunities afforded by the state laws. Appellants have already shown clearly that the incident here taxed is not a "local incident, separate and apart from commerce" but is an essential and integral part of interstate commerce itself.

(2) *Appellants Receive No Special "Benefits, Protection and Opportunities" Under the Conservation and Proration Statutes of Texas*

While, as stated above, appellees' argument based on the Texas conservation and proration laws is wholly irrelevant to the issue raised by these appeals, appellants will point out the lack of factual support for such argument.

The Texas statute by which the conservation of oil and gas is accomplished shows on its face that it was enacted for the purpose of preventing waste and protecting the correlative rights of producers (among themselves) by compelling ratable production.¹⁰ The history of the industry shows that such statutes and regulations issued thereunder are for the protection of producers *against each other* in order that all producers may have an opportunity to produce their fair shares of the total quantity of recoverable oil and gas in a common pool. Such statutes and regulations have been sustained only because they were enacted and promulgated for that purpose and have that effect. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 69 (1937). In fact, it was stipulated in the instant cases:

¹⁰ The "declaration of policy" which is contained in the Texas Conservation Act is as follows:

"In recognition of past, present and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production," Article 6008, V.A.C.S., Sec. 1.

“Proration orders affecting the sweet gas portion of the Panhandle Field and the Texas portion of the Hugoton Field entered in 1948 were not designed to preserve the supply of any purchaser of gas for any particular time, but were *only designed to prevent waste and adjust correlative rights of all producers* in each of such fields for the aggregate markets supplied therefrom” (R. 120). (Emphasis supplied.)

Appellees contend that because of the enforcement of these conservation and proration regulations the pipeline companies receive benefits, protection, and opportunities through (a) lengthened economic life of their transmission facilities, (b) the right to make nominations for the purchase of gas, and (c) the right of *producers* of gas to adjust their rates of production on a seasonal basis.

(a) *The “lengthened life” argument*

Appellees base this argument on many “iffy” premises: *If* producers were permitted to drill as many wells as they desire; *if* they could open their wells at 100 per cent of the open flow; *if* they could burn both sour gas and sweet gas for making carbon black; *if* the producer, after extracting the liquid content from his gas, should flare the residue into the air—then the supply of gas would be exhausted earlier than otherwise. The statutes relied on are designed to end these practices.

According to Mr. Murray’s own testimony (R. 160), these unrealistic premises are based on conditions that existed more than 15 years ago in the Panhandle Field at a time when the few pipelines

transporting gas from that field to other states had not had time to develop adequate markets in the states to which they then transported gas. He conceded that it is largely because additional pipelines have been constructed into Texas within the last few years (and during that same period older pipelines have greatly increased their purchases) that the State of Texas is able to enforce its laws prohibiting the waste of gas. He stated that the coming of the interstate pipelines into the state has assisted the Railroad Commission in putting into effect conservation measures which it probably would not have been able to enforce but for the markets for gas provided by those companies; that the conservation orders by the Commission and markets furnished by the pipeline companies are all inter-connected in the sense that "each kind of helps the other out a little bit" (R. 190).

Obviously, all purchasers of gas (not just the pipeline companies) will have supplies available for a longer period if gas is not wasted than they would if the gas is permitted to go to waste by the producers. It is simple arithmetic that the more apples that are taken from a barrel (whether to eat or to throw away) the fewer apples will be left in the barrel.

However, the pipeline companies are not the special beneficiaries under these laws. They receive incidental benefits from the prevention of waste, as do all other purchasers of gas. But they benefit not at all from the proration regulations. The producers benefit primarily and principally from the prevention of waste; and they alone benefit from prora-

tion. The State itself and its every citizen benefit from the conservation of oil and gas, the State's greatest natural resources. So do the owners of gasoline plants, carbon black plants, and the hundreds of industrial plants using gas as fuel. The producers and refiners of crude oil and the transporters of crude oil and refined products likewise benefit from the prevention of waste; but no such tax as that here involved is levied on the transporters of oil or refined products.

(b) *The right to make "nominations".*

Much is said by appellees about the fact that pipeline companies have the right to "nominate" purchases of gas. This right, however, is one which is common to all who desire to purchase gas for non-wasteful purposes, including industries as well as pipeline companies. Moreover, contrary to the implications of appellees' argument, it does *not* entitle the nominator to any gas. It was stipulated:

"Neither Michigan-Wisconsin Pipe Line Company [Panhandle] nor any other purchaser had any guaranty under the terms and provisions of the Texas Conservation Laws, either before or after the issuance of regulations by the Texas Railroad Commission, that a particular supply of gas would be available to them for any particular period of time" (R. 120 and 96).

By Section 12 of the Conservation law (V.A.C.S., Article 6008), the Commission is required to determine the lawful market demand for gas to be pro-

duced from each reservoir during a particular period and the volume of gas that can be produced from such reservoir during such period without waste.

In order to ascertain such market demands from the reservoir, the Commission takes estimates (called nominations)²⁰ from all those who expect to purchase gas produced from the reservoir. The nominations are made for the sole purpose of assisting the Commission in determining the aggregate quantities of gas desired by those who want to purchase in order that the Commission may obtain a reasonable estimate of the market demand for use in apportioning the estimated demand among all producers on an equitable basis.

As a result of the nominations, the Railroad Commission enters an order granting to each producer the right to produce a specified quantity of gas if he can find a purchaser. Contrariwise, a nomination does not guarantee that a pipeline company will be able to purchase a single foot of gas (R. 152). The right to purchase is not contingent on the making of a nomination. The nominations, therefore, are solely a part of the procedure adopted by the Commission for the purpose of taking action designed to give each producer in the reservoir the opportunity to produce and sell, wherever he can find a buyer, his fair share of the total volume of gas which the Commission authorizes the producers as a class to produce and sell for all lawful purposes.

²⁰ A copy of the official "nomination" form is set out at R. 237-238.

(c) *The "overproduction" and "under-production" argument.*

Commissioner Murray expressed the view that the Legislature "specifically for the benefit of the pipelines" passed an over and under six-months balancing provision (R. 153). The statute to which he referred (V.A.C.S. 6008, Sec. 14) provides:

"In order to *adjust the correlative rights* and opportunities of each owner to produce, use and sell gas from a common reservoir from which a portion of the market demand is seasonal or where a portion thereof fluctuates from month to month, the Commission may permit the wells in such reservoir to be produced in excess of the monthly allowable if no waste is occasioned thereby." (Emphasis supplied.)

The statute then provides that if a producer does not have sufficient wells with the allowable production he needs during a particular month, he can over-produce his wells for a period of six months and then have a six-months period in which to make up the over-production.

There is nothing in the law to show that the provision referred to was for the benefit of the pipelines, specifically or otherwise. On the contrary, the statute shows on its face that it is for the benefit of the producers of gas.

(3) *The effect of the "benefits, protection and opportunities" argument, if applied as a test under the commerce clause*

If pipeline companies, in general, and these appellants in particular, receive benefits through the

operation of the conservation and proration laws and regulations of Texas, those benefits are in the category of the benefits received by those who purchase lumber in a state because of the laws protecting forests, or the benefits which those who make property investments in a state receive from the enforcement of laws prohibiting theft, malicious mischief and monopoly. The laws merely create a favorable condition in which to engage in business.

If the right to engage in interstate commerce can be taxed by a state because of the circumstance that the state, in order to prevent waste and protect correlative rights of its local producers who carry on local activities, has adopted conservation policies (or any other policy which makes the state a favorable one in which to purchase commodities for transportation), the area in which that philosophy could, with equal reason, be urged is almost without limit. Texas and other oil producing states have conservation regulations in order to prevent waste of oil and to protect the correlative rights of producers of oil; Texas and other lumber-producing states have stringent regulations for the protection of forests against wanton destruction, thereby safeguarding the rights of those who own such forests. The cotton-producing states have regulations for elimination of the boll-weevil. The citrus-growing states have regulations for the allocation of markets.

But does the circumstance that the state prohibits the waste of oil justify imposing upon those who operate railroads, tankers, trucks and pipelines a privilege tax for the right to take possession of oil and

its products, gasoline, kerosene, fuel oil, asphalt, etc., for the purpose of transporting the same to other states? Does the fact that the state adopts a policy of protecting forests justify imposing a tax on railroads, steamships and trucks for the privilege of taking possession of lumber for transportation to other states? Can a privilege tax, imposed on the right to take bales of cotton at compresses or cottonseed oil and cake at cottonseed oil mills into possession for transportation to other states, be sustained because of the circumstance that, but for the regulations imposed by the state in an effort to eliminate the bollweevil, there would not be as many bales of cotton or as much cottonseed oil or cake available for transportation?

Indeed, there are few instances in which a state could not, with some reason, lay claim to the right to tax interstate commerce if the only test were whether the instrumentality of that commerce is afforded "benefits, protection and opportunities" by the state. Necessarily, all interstate commerce is carried on within the confines of the states, as this Court has often remarked. Necessarily too, that commerce benefits from the very fact that state governments exist, that law and order prevail, that property rights are respected.

But the framers of the Constitution made certain that, despite those benefits conferred by the states, interstate commerce shall be free from regulations and burdens except those imposed by the national authority.

III

The Jurisdictional Question.

The Court has reserved until hearing on the merits a determination of whether the appeals are properly from the Court of Civil Appeals or from the Supreme Court of Texas.

In early cases, such as *Bacon v. Texas*, 163 U.S. 207 (1896), *St. Louis S. F. & T. Ry. Co. v. Seale*, 229 U.S. 156 (1913), and *Aransas Pass Ry. Co. v. Wagner*, 241 U.S. 476 (1916), this Court held that where the Texas Supreme Court "denied" a writ of error to review the judgment of the Court of Civil Appeals, the latter Court was "the highest court of a state in which a decision could be had," within the meaning of Title 28, U.S.C., Sec. 1257.

In 1927 there was added to Article 1728 of the Revised Civil Statutes of Texas an amendment which provided that when the Texas Supreme Court believes that the judgment of a Court of Civil Appeals is a correct one, and that the principles of law declared in the opinion of the Court of Civil Appeals are correctly determined, the Supreme Court will "refuse" an application for writ of error. This same provision has been carried into Rule 483 of the Texas Rules of Civil Procedure in the following language:

"In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the Court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused.' In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all

respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation 'Refused. No reversible error.' In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation 'Dismissed for want of jurisdiction.' "

Hence, since 1927, the "refusal" of a writ of error by the Texas Supreme Court, without the notation "no reversible error," has constituted at least an implied expression with respect to the merits of the decision of the Court of Civil Appeals. This fact affords some basis for an argument that decisions in such cases as the *Bacon, Seale and Wagner* cases, *supra*, are no longer controlling, and that, under decisions such as those in *Hetrick v. Lindsey*, 265 U.S. 384 (1924), and *Matthews v. Huwe*, 269 U.S. 262 (1925), whenever the Texas Supreme Court *refuses* an application for writ of error, that Court is the one from which an appeal or petition for certiorari to this Court should be prosecuted. Cf. *American Railway Express Co. v. Levee*, 263 U.S. 19 (1923).

The problem was not solved by *Bain Peanut Co. v. Pinson*, 282 U.S. 499 (1931), since the application for writ of error in that case had been "dismissed for want of jurisdiction," and not "refused". However, the question was directly raised in a motion to dismiss which was filed in connection with the appeal in *United Gas Public Service Co. v. Texas*, 301 U.S. 667 (1937). This Court denied the motion, citing, *inter alia*, *Norfolk & Suburban Turnpike Co. v. Virginia*, 225 U.S. 264 (1912). From such action, it might be

inferred that this Court believes that the refusal of a writ of error by the Texas Supreme Court is not "an affirmance in express terms" within the holding of the *Norfolk* case, with the result that appeals and petitions for certiorari should continue to be prosecuted from the Court of Civil Appeals in cases where the Texas Supreme Court has refused writ of error. This inference is strengthened by the fact that in *Lone Star Gas Co. v. Texas*, 304 U.S. 224 (1938), this Court entertained an appeal from a Court of Civil Appeals in a situation in which the Texas Supreme Court had "refused" a writ. In both the *United* case and the *Lone Star* case, this Court directed its mandate to the Court of Civil Appeals and stated in such mandate that it had reviewed the judgment of the Court of Civil Appeals.

However, in *Sweatt v. Painter*, 339 U.S. 629 (1950), which was also a case in which the only action by the Texas Supreme Court was the refusal of a writ, this Court directed its writ of certiorari to the Supreme Court rather than to the Court of Civil Appeals. In addition, this Court directed its mandate to the Texas Supreme Court, and stated in such mandate that the judgment which it had reviewed was the judgment in which the Texas Supreme Court "refused" the application for writ of error.

The *Sweatt* case is the latest Texas case to come before this Court involving the refusal by the Supreme Court of Texas of a writ of error. In view of the fact that the writ of certiorari in that case was issued to the Texas Supreme Court, appellants felt that they could not, with safety, rely upon the prior cases in which appeals and writs of certiorari

have come from, or been directed to, the Courts of Civil Appeals. Hence, as a matter of precaution, appellants filed their appeals from the Supreme Court of Texas in the alternative to the appeals which they have filed from the Court of Civil Appeals. Precedent for such action is found in *Western Union Telegraph Co. v. Priester*, 276 U.S. 252 (1928). See also Stern & Gressman, *Supreme Court Practice*, p. 165.

Counsel for appellants do not interpret the action of this Court in the *Sweatt* case to reflect a change in view from the holdings made in former cases, particularly *United Gas Public Service Co. v. Texas*, 301 U.S. 667. They understand that in certiorari proceedings this Court has broad powers to require that records be transmitted to it, wherever those records may physically be; and assume that in the *Sweatt* case the Court considered that the record was still in the possession of the Supreme Court of Texas when it issued its writ to that Court.

It is, therefore, the view of appellants that under the holdings of this Court the proper appeals are those taken from the Court of Civil Appeals, Nos. 198 and 200, respectively.

Conclusion

As this Court stated in *Freeman v. Hewit*, 329 U.S. 249, 251 (1946): "The power of the States to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment." While the court has not always been in agreement as to particular points close to the line, there has never been

disagreement with the conclusion that a tax imposed upon an instrumentality of transportation for the privilege of engaging in interstate commerce violates the very fundamentals upon which the Commerce Clause was founded. A more direct burden, a more sweeping regulation of national commerce, would be difficult to imagine.

For the reasons stated, the judgments of the Court below should be reversed and those of the District Court affirmed.

Respectfully submitted,

ARTHUR R. SEDER, JR.
S. A. L. MORGAN

*Counsel for Appellant Michigan-
Wisconsin Pipe Line Company*

E. H. LANGE
GENE M. WOODFIN
CHAS. I. FRANCIS

*Counsel for Appellant Panhandle
Eastern Pipe Line Company*

EVERETT L. LOONEY
R. DEAN MOORHEAD
D. H. CULTON

Counsel for Both Appellants

SIDLEY, AUSTIN, BURGESS & SMITH
VINSON, ELKINS, WEEMS & SEARLS
LOONEY, CLARK & MOORHEAD
CULTON, MORGAN, BRITAIN & WHITE

Of Counsel

APPENDIX

**Copy of Section XXIII, H. B. 285, Chapter 402,
Acts of the 52nd Legislature of Texas, 1951
(V.A.C.S. 7057f)**

*Art. 7057f. Occupation tax on business of
gathering gas*

Definitions

Section 1. The provisions of Texas Revised Civil Statutes (1925) Articles 10, 11, 12, 14, 22 and 23 and Texas Laws 1947, Chapter 359,¹ on the interpretation of Statutes shall apply specifically to this Section. In addition to these standard definitions, in this Section, unless the context otherwise requires:

(a) "Gas" means natural and casinghead gas or other gas taken from the earth or waters, regardless of whether produced from a gas well or from a well also productive of oil, distillate, condensate or other product.

(b) "Casinghead gas" means any gas or vapor indigenous to an oil stratum and produced from such stratum with oil.

(c) "Gathering gas" means the first taking or the first retaining of possession of gas produced in Texas for transmission whether through a pipe line, either common carrier or private, or otherwise after severance of such gas, and after the passage of such

¹ Article 23a.

gas through any separator, drip, trap, meter or other method designed to separate the oil therefrom. In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term "gathering gas" means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipe line, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant.

(d) "Gatherer" means any person engaged in the gathering of gas.

(e) "Person" means and includes any person, firm, concern, receiver, trustee, executor, administrator, agent, institution, association, partnership, company, corporation, and persons acting under declarations of trust, as well as trustees acting under declarations of trust.

(f) "Cubic foot of gas" or "standard cubic foot of gas" shall have the definition ascribed thereto by Texas Laws, 1949, Chapter 519, Section 4, Texas Revised Civil Statutes (Vernon, 1948), Article 7047b, Section 2 (12).

Imposition of tax; amount; calculation

Sec. 2. In addition to all other licenses and taxes levied and assessed in the State of Texas, there is hereby levied upon every person engaged in gathering gas produced in this State, an occupation tax for the privilege of engaging in such business, at the

rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered.

In determining the quantity of the gas for the purposes of calculating such tax, there shall be excluded (a) gas produced and then lawfully injected into the earth of this State; (b) gas used for fuel in connection with lease or field operations; (c) gas lawfully vented or flared; and (d) gas used in the manufacturing of carbon black.

Payment; penalty for delay

Section 3. The tax levied hereby shall be paid by the gatherers on the 25th day of each month on all gas gathered in the State during the next preceding thirty (30) days prior to the first day of the month in which payment is required to be made. If such payment is not made within the time prescribed, the amount due shall become delinquent and a penalty of ten per cent (10%) of the amount of the tax shall be added and such tax and penalty shall bear interest at the rate of six per cent (6%) per annum from date until paid.

Unlawful to require producer to pay

Sec. 4. The tax imposed by this Act is a tax on the occupation of gathering gas and not on the production of gas; therefore, it shall be unlawful for any gas gatherer to require any producer to pay the tax imposed under this Act under any contract provision between the producer and the gas gatherer allowing the gatherer to deduct from sums owed the

producer amounts paid by the gatherer by reason of the imposition of a tax on production.

Records and reports; rules and regulations

Sec. 5. It shall be the duty of each gatherer of gas in this State to keep accurate records within this State of all gas gathered and showing also what disposition is made of same, and to make reports to the Comptroller of Public Accounts of gas gathered upon forms prescribed by the Comptroller of Public Accounts. The Comptroller shall prescribe forms of reports to be made by such gatherers and to require that such reports be made on officially prescribed forms.

The Comptroller of Public Accounts shall have the power to prescribe such rules and regulations, and require such records and reports as may be needed to aid in the administration and enforcement of this Act.

Examinations and investigations; appropriation for administration and enforcement

Sec. 6. The Comptroller shall employ auditors and technical assistants for the purpose of verifying reports and investigating the affairs of gatherers to determine whether the tax is being properly reported and paid. He shall have the power to enter upon the premises of any taxpayer liable for a tax under this Act, and any other premises necessary in determining the correct tax liability, and to examine, or cause to be examined, any books, or records, of any person, subject to a tax under this Act, and to secure any

other information directly or indirectly concerned in the enforcement of this Act, and to promulgate and enforce, according to law, rules and regulations pertinent to the enforcement of this Act, which shall have the full force and effect of law. Before any division or allotment of the occupation tax collected under the provisions of this Act is made, one fifth ($1/5$) of one per cent (1%) of the occupation tax paid monthly as may be needed in such administration and such enforcement is hereby appropriated for such purpose.

Delinquency; injunction

Sec. 7. In the event any gas gatherer in this State shall become delinquent in the payment of the proper taxes herein imposed, or fails to file required reports with the Comptroller, the Attorney General by a suit in the name of the State of Texas shall have the right to enjoin such person from gathering gas until the delinquent tax is paid or said reports are filed, and the venue of any such suit for injunction is hereby fixed in the county where the offense occurs.

*Violations; lien; ascertainment of amount due;
gas audit fund; suits*

Sec. 8. If any person shall violate any of the provisions hereof, he shall forfeit to the State of Texas as a penalty not less than Twenty-five Dollars (\$25) for each violation and each day's violation shall constitute a separate offense. The State shall have a prior lien for all delinquent taxes, penalties, and interest on all property and equipment used by the

gatherer of gas in his business of gathering gas, and if any gatherer of gas shall fail to remit the proper taxes, penalties, and interest due, or any of them, the Comptroller may employ auditors or other persons to ascertain the correct amount due, and the gatherer of gas shall be liable, as an additional penalty, for the reasonable expenses or the reasonable value of such services of representatives of the Comptroller, incurred in such investigation and audit; provided, that funds collected for audits and examinations shall be placed in a gas audit fund in the Treasury and shall constitute a revolving fund which may be used from time to time by the Comptroller in making such audits in addition to the general appropriation made for such purpose, and all of said funds to be placed in said gas audit fund are hereby appropriated for such purpose. The Attorney General shall file suit in the name of the State of Texas for all delinquent taxes, penalties, and other amount due, and for the enforcement of all liens under this law; and the venue of any such suit is hereby fixed in Travis County.

*Reports and audits as evidence; sale or
transfer of agreements*

Sec. 9. (a) If any person liable for the payment of the tax hereby levied, or required to remit the same to the Comptroller of Public Accounts, fails or refuses to pay any tax, penalty, or interest within the time and manner provided by the Act and it becomes necessary to bring suit or to intervene in any manner for the establishment or collection of said claim in any judicial proceedings, any report filed in

the office of the Comptroller by such gatherer or representative of said gatherer or a certified copy thereof certified to by the Comptroller showing the amount of gas gathered on which tax, penalties or interest have not been paid, or any audit made by the Comptroller or his representative from the books of said gatherer when filed and sworn to by such representative as being made from the records of said gatherer, such report or audit shall be admissible in evidence in such proceedings and shall be prima-facie evidence of the contents thereof; provided, however, that the incorrectness of said report or audit may be submitted in evidence only against the party by or from whom it was made.

(b) In the event the Attorney General shall file suit of claim for taxes, provided for in the foregoing, and attach or file as an exhibit any report or audit of said gatherer, and an affidavit made by the Comptroller or his representative that the taxes shown to be due by said report or audit are past due and unpaid and that all payments and credits have been allowed, then unless the party resisting the same shall file an answer in the same form and manner as required by Article 3736, Revised Civil Statutes of Texas of 1925, as amended by Chapter 239, Acts of the Regular Session of the Forty-second Legislature, said audit or report shall be taken as prima-facie evidence thereof, and the proceedings of said Article are hereby made applicable to suits to collect taxes hereunder.

(c) When any contract or agreement of gathering gas changes hands, the old gas gatherer shall note on his last report that said contract, or agreement has been sold or transferred, showing the effect-

ive date of said change and the name and address of the person who will gather gas under said contract, or agreement and be responsible for the filing of reports provided for in this Act, and the new gas gatherer shall note on his first report that said contract, or agreement has been acquired, showing the effective date of said change and the name and address of the person formerly gathering gas under said contract, or agreement.

Disposition of collections

Sec. 10. All money derived from and collected by the State of Texas, under the provisions of this Act, less one-fifth ($1/5$) of one per cent (1%) as provided for in Section 6 hereof, shall be deposited in the State Treasury, in the proportion as follows: one-fourth ($1/4$) of the same shall go to and be placed to the credit of the Available Free School Fund; the remaining three-fourths ($3/4$) shall go to and be placed to the credit of the General Revenue Fund.

Invalidity as to interstate transmission; effect

Sec. 11. In the event the tax levied by this Section is declared unconstitutional or invalid by a court of competent jurisdiction as to gas gathered for interstate transmission, the tax shall not be levied as to gas gathered for intrastate consumption. Acts 1951, 52nd Leg. p. 695, ch. 402, § XXIII.

Emergency, Effective Sept. 1, 1951.

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SUPREME COURT OF THE STATE OF TEXAS

October Term, 1924

No. 198, 199

MICHIGAN-WISCONSIN PIPE LINE COMPANY, Appellants

v.

**ROBERT S. CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS,
ET AL., Appellees**

No. 200, 201

PANTANUS EASTERN PIPE LINE COMPANY, Appellants

v.

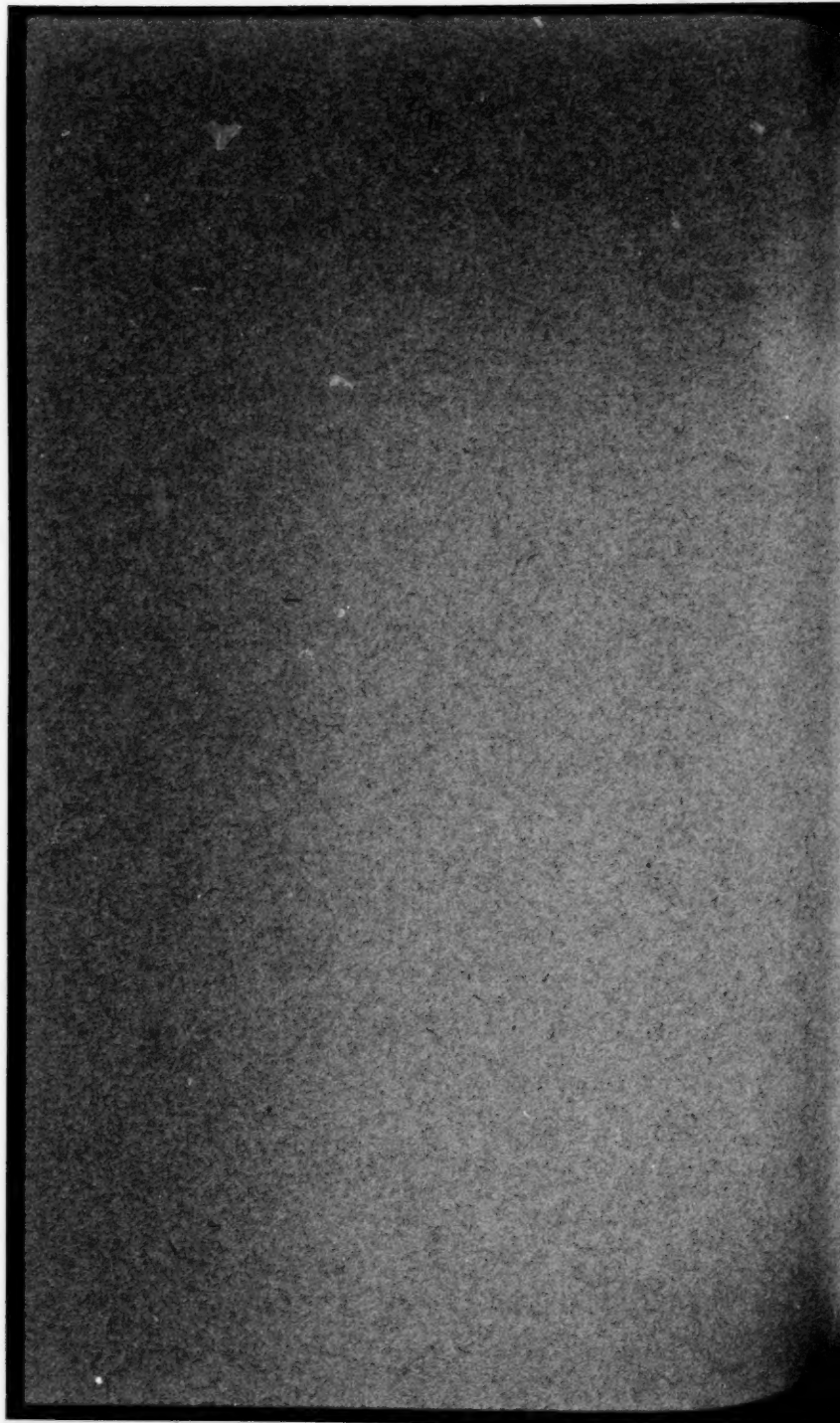
**ROBERT S. CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS,
ET AL., Appellees**

APPEALS BY EACH APPELLANT FROM BOTH THE SUPREME COURT
OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE
THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

REPLY BRIEF FOR APPELLANTS

ARTHUR R. SEWELL, JR.
EVERETT L. LOONEY
R. DEAN MOORHEAD
D. H. CULTON
S. A. L. MORGAN
*Counsel for Appellants
Michigan-Wisconsin
Pipe Line Company*

E. H. LAMSON
GLEN M. WATSON
CHAR. L. FRAZER
EVERETT L. LOONEY
R. DEAN MOORHEAD
D. H. CULTON
*Counsel for
Pantanus Eastern
Pipe Line Company*



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Supreme Court of the United States

OCTOBER TERM, 1953

Nos. 198, 199

MICHIGAN-WISCONSIN PIPE LINE COMPANY, *Appellant*

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APPEALS BY EACH APPELLANT FROM BOTH THE SUPREME COURT
OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE
THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

REPLY BRIEF FOR APPELLANTS

I.

APPELLANTS HAVE PROPERLY CHALLENGED THE
VALIDITY OF THE TAX AS TESTED BY THE
COMMERCE CLAUSE

As Appellants had suggested, this Court reserved the question of its jurisdiction on appeal. Obviously, since appeals were taken from two different state courts,

the appeals from one of these courts must be dismissed. This question was discussed by appellants at pages 58-61 of their opening brief. The Attorney General of Texas has not seen fit to advise the Court of his views with respect to this important procedural question. Instead, appellees argue, under a heading entitled "Jurisdictional Question" (Appellees' Brief, pp. 7-13) that the validity of the gathering tax statute was not properly raised in appellants' protests and pleadings in the state court.

This is indeed a surprising contention. If applicable now, it would have been equally applicable in the courts below and in Appellees' Motion to Dismiss or Affirm filed in this Court. Yet the argument has never before been made or even suggested. Moreover, the District Court specifically recognized the adequacy of the protest and pleadings to raise the Commerce Clause question by holding the tax invalid on that very ground, as applied to appellants' activities.

The Court of Civil Appeals also expressly recognized that the question as to the validity of the Act as tested by the Commerce Clause had been sufficiently raised. It said:

"The single question presented for our decision is whether Article 7057f, a revenue statute, the pertinent portions of which are set out below, as applied to the business activities of appellees, violates the Commerce Clause of the Constitution of the United States. If so it is void, if not it is valid." (R. 35-37)

The entire opinion was thus written in recognition of the fact that the federal question had been properly raised and preserved. This Court will accept the recognition by the state courts that the constitutional question has been properly raised. When the validity of a statute has been considered and decided by the state courts, this Court will not inquire when and how the validity was challenged. *Charleston F.S. & L. Assn. v. Alderson*, 324 U. S. 182, 185-186 (1945).

The only criticism by appellees of the protests is that such protests do not contain an express allegation that the

tax is an "undue" burden on interstate commerce, that it is discriminatory against interstate commerce, or that it subjects interstate commerce to the risk of "multiple burdens." Thus, in fact, appellees do not claim that the validity of the tax under the Commerce Clause was not raised below, but rather that all of the arguments that could have been advanced by appellants were not set forth in detail in the formal protests and pleadings. The Court will observe from a cursory examination of these documents (R. 1, 7, 11, 23) that the issue of the validity of the tax under the Commerce Clause was raised in great and perhaps unnecessary detail. Texas courts do not require that a protest set forth the arguments in support thereof. *James v. Consolidated Steel Corp.* (Ct. Civ. Appeals) 195 S. W. 2d 955, 962 (1946). To contend that appellants are now foreclosed from advancing certain arguments in support of their contentions—that is, from pointing out to the Court the effect upon interstate commerce of the tax here in question—because not specifically spelled out in their protests and pleadings is absurd.

II.

APPELLEES' "CONTROLLING PRINCIPLE"

At page 17 of appellees' brief it is stated, under the heading "Controlling Principle":

"Although a person is engaged solely in interstate commerce, a state may validly levy a non-discriminatory tax upon a local incident or activity of the interstate business, which is separate and apart from the actual flow of commerce, provided the taxpayer is receiving from the state levying the tax, benefits, protection or opportunities which bear a fiscal relationship to the tax."

As appellants stated in their opening brief (p. 47), they "have no quarrel with this statement as an abstract principle." The Court will immediately recognize, however, that the statement comprehends two separate and distinct elements, one relating to the validity of a statute under the

Commerce Clause and the other to its validity under the Due Process Clause. Cf. *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 174 (1949). Appellants have raised no question concerning the validity of the gathering tax statute under the Due Process Clause; thus the proviso in the above quotation is wholly irrelevant to the decision in these appeals.

Despite this fact appellees devote much the greater portion of their argument to the academic question whether appellants received "benefits, protection and opportunities" from the State of Texas. With respect to the only issue actually involved—that arising under the Commerce Clause—appellees now give lip service to the principle that the receiving of gas by appellants into their pipelines for immediate transmission to other states cannot be taxed unless such taking is a local incident separate and apart from commerce; but they gloss over the question whether such taking is a local incident—indeed, they assume that it is such an incident. Appellees have thus resorted to the familiar ruse of setting up a straw man and then attempting to strike it down in an effort to lead the Court away from the decisive point presented by the record.

III.

THE CASES CITED BY APPELLEES DO NOT SUPPORT THEIR POSITION ON THE DECISIVE QUESTION

In their opening brief appellants demonstrated that a tax laid on the privilege of taking gas into their pipelines for immediate transportation in interstate commerce is not a tax on a local incident separate and apart from the commerce itself. They feel that it is not necessary to repeat such argument here.

In the few pages (beginning on page 25) of their brief dealing with this subject, appellees utterly fail to show how the taking or receiving of gas for immediate interstate transportation can be carved out of the economic process of transportation itself. Instead, they cite and apparently rely upon cases involving widely different fact situations,

having no relation to the facts here involved or the validity of the tax under consideration. Thus, *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172 (1923), involved a severance tax laid upon the mining of iron ore and other minerals. In sustaining the tax this Court simply reaffirmed the well-established distinction between the traditional local activity of severing minerals from the earth and their subsequent interstate transportation. The tax was purely a severance tax on the mining operation, not, as here, a tax on a carrier for the privilege of receiving mineral products for immediate interstate transportation.¹ *Chassanoil v. Greenwood*, 291 U. S. 584 (1934), involved an occupation tax levied upon those engaged in the buying and selling of cotton within the state. The tax was not levied upon an interstate purchaser or upon the carrier for the privilege of loading the cotton on interstate transportation facilities. The Court simply held that these steps in *preparation* for subsequent sale and shipment were local in nature.

Appellees also cite but do not discuss *McGoldrick v. Berwind-White Co.*, 309 U. S. 33 (1940); *International Harvester Co. v. Dept. of Treasury*, 322 U. S. 340 (1944); and *Dept. of Treasury v. Wood Preserving Corp.*, 313 U. S. 62 (1941). None of these cases is applicable to the question here for the reasons stated by this Court in *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947). In none of the cases cited by appellees did this Court intimate that an act which is an essential and indispensable part of the transportation process, such as taking possession of a commodity for immediate interstate transportation, is a local activity which can be taxed by the state—one in which the carrier can engage only under a right granted by the state.

¹ At page 28 of their brief appellees say: "The Oliver Iron Company performed the same two activities the appellants perform: the taking and the transportation of a natural resource to fill existing contracts with consumers without the State." This statement is wholly without foundation. The Oliver Iron Company did not take possession of ore for transportation, nor did it transport the ore.

IV.

THE RECEIVING OF A COMMODITY FOR TRANSPORTATION CAN NOT BE CARVED OUT OF THE TRANSPORTATION PROCESS ITSELF

At pages 38 and 39 of their brief appellees seek to distinguish the so-called "stevedoring cases," *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90 (1937), and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947), the cases most nearly in point on the facts.²

The alleged distinction advanced by appellees is that the stevedores "not only took possession of the goods but actually transported the goods between the dock and the hold of the ships and that such transportation in reality constituted the first or last leg of an interstate journey." (Appellees' Brief, p. 39). If that analysis is accepted, the present cases clearly present a *fortiori* situations for the invalidity of the tax. Appellants would stand in the position, not of the stevedores, but of the ship—the recipient of the goods. Moreover, Phillips Petroleum Company, which transports the gas 300 yards from the outlet of its gasoline plant to the inlet of appellants' pipelines, would stand in the shoes of the stevedores. Appellees would apparently agree that, in performing that transportation function, Phillips would be protected from taxation under the Commerce Clause, yet the pipeline company—the analogical equivalent of the ship—is said not to be engaged in interstate commerce when it receives possession of the gas. Obviously, appellees' attempted distinction of the stevedoring cases is frivolous.

² In both stevedoring cases the Court cited and relied upon *Baltimore & Ohio S. W. Ry. Co. v. Burtch*, 263 U. S. 540 (1924), where a bystander was injured while, at the request of a railroad conductor, he was helping to unload a piece of machinery from a railroad car. In holding that this injury was covered by the Federal Employers' Liability Act, this Court said:

"It is too plain to require discussion that the loading or unloading of an interstate shipment . . . is so closely related to interstate transportation as to be practically a part of it . . ." (263 U. S. at p. 544)

Appellees also attempt to draw a distinction between receiving a commodity for transportation and the actual transportation (in the sense of movement) itself. The short answer to that contention is to be found in this Court's holding in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203 (1885):

"Transportation *implies* the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such *receiving* and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation." (Emphasis supplied.)

V.

APPELLEES' "BENEFITS, PROTECTION AND OPPORTUNITIES" ARGUMENT

Notwithstanding the lack of relevance of alleged "benefits, protection and opportunities" afforded the pipeline companies by the conservation and proration laws and regulations of Texas to the real issue in this case, appellees devote the greater portion of their brief to that subject. They attempt to support their claims, not by anything shown on the face of the conservation laws or anything in the history of the legislation, but solely on certain theories expounded by one of the members of the Texas Railroad Commission. The witness did not purport to base his theories on official action of the Commission or upon personal knowledge of legislative intent. He merely expressed his own personal conclusions in response to obviously leading and suggestive questions propounded on behalf of appellees. See, e.g., R. 142. That these theories are wholly lacking in substance is fully shown at pages 50-55 of appellants' opening brief.

VI.

THE TAX IS NOT SUPPORTED BY APPELLEES' ARGUMENT THAT "INTERSTATE COMMERCE SHOULD PAY ITS WAY"

In the conclusion of their brief (p. 47), appellees make the familiar argument that the interstate business of the pipeline companies should be made to "pay its way" through enforcement of this tax. Appellees overlook the fact that, as stated in *Spector Motor Service v. O'Connor*, 340 U. S. 602, 608 (1951):

" . . . the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so."³

Moreover, the record shows that appellants' interstate business already fully "pays its way." The State of Texas has imposed a production tax of 5.72 per cent of the value at the well of every cubic foot of gas which appellants transport through their pipelines. (V.A.C.S., Art. 7047b) This tax is paid by the pipelines either directly as producers or indirectly as a part of the price paid for gas purchased from others (R. 85, 113). Likewise, the State levies a special tax to cover the costs incurred by the Railroad Commission and the Attorney General in enforcing the conservation and proration laws and other activities of the Commission (V.A.C.S., Arts. 6032, 6066). This tax not only pays all of the so-called "burdensome expenses" (see Appellees' Brief, p. 2) which the State incurs in administering its conservation and proration laws but leaves, in addition, an annual surplus of over one million dollars, which is transferred to the State General Revenue Fund (R. 240-241).

Moreover, each appellant pays the State of Texas an ad valorem tax on the value of all of its facilities and leases within the State (R. 85, 113). Hence a tax has been paid

³ See also *Freeman v. Hewit*, 329 U. S. 249, 256 (1946).

the State with respect to every cubic foot of gas which appellants transport in their pipelines, and an additional tax has been paid with respect to every inch of pipeline and all other properties and facilities owned by appellants within the State.

It should be reiterated that the "gathering tax" here involved was not imposed to recoup costs of regulating, inspecting or policing appellants' activities. The State incurs no expenses of that character. Appellees frankly stated in their Motion to Advance filed in this Court that if the tax is held valid a special session of the Legislature will be called to dispose of the tax moneys by appropriations to increase teachers' and public employees' salaries, finance the Texas eleemosynary institutions and provide a program of drought relief. But, however laudable those expenditures may be, this burden may not be shifted to "the consumers of thirty-eight other states" (Appellees' Brief, p. 34) through a tax on the privilege of engaging in interstate commerce. See *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1, 35, 37 (1910).

CONCLUSION

For the reasons stated, the judgments of the court below should be reversed and those of the District Court affirmed.

Respectfully submitted,

ARTHUR R. SEDER, JR.

S. A. L. MORGAN

*Counsel for Appellant Michigan-
Wisconsin Pipe Line Company*

E. H. LANGE

GENE M. WOODFIN

CHAS. I. FRANCIS

*Counsel for Appellant Pan-
handle Eastern Pipe Line Com-
pany*

EVERETT L. LOONEY

R. DEAN MOORHEAD

D. H. CULTON

Counsel for Both Appellants

SIDLEY, AUSTIN, BURGESS & SMITH

VINSON, ELKINS, WEEMS & SEARLS

LOONEY, CLARK & MOORHEAD

CULTON, MORGAN, BRITAIN & WHITE

Of Counsel

FILED

JUL 23 1953

HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 198

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
Appellant,

vs.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS,
ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD
SUPREME JUDICIAL DISTRICT OF TEXAS

STATEMENT OPPOSING JURISDICTION AND
MOTION TO DISMISS OR AFFIRM

✓ JOHN BEN SHEPPERD,
Attorney General of Texas;

W. V. GEPPERT,
Assistant Attorney General;

W. C. K. RICHARDS,
*Assistant Attorney General,
Counsel for Appellees.*

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Appellees include herein their motion to dismiss the appeal, or, in the alternative, to affirm the judgment of the

Court of Civil Appeals for the Third Supreme Judicial District of Texas, on the ground that the federal question relied upon by appellant is unsubstantial in character, in that the question urged for reversal has been plainly foreclosed by prior decisions of the Supreme Court.

The Federal Question Is Unsubstantial

The United States Supreme Court has consistently recognized the following proposition of law which governs this appeal:

Although a person is engaged solely in interstate commerce, a State may validly levy a non-discriminatory tax upon a local incident or activity of the interstate business, which is separate and apart from the actual flow of commerce, provided the taxpayer is receiving from the State levying the tax, benefits, protection or opportunities which bear a fiscal relationship to the tax. *Memphis Gas Company v. Stone*, 335 U. S. 80 (1948); *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435 (1940); *Freeman v. Hewit*, 329 U. S. 249 (1946); *Inspector Motor Service v. O'Connor*, 340 U. S. 602 (1951).

The Supreme Court stated in an opinion by Mr. Justice Reed in the *Memphis Gas Company* case:

"We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. *This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business.*" 335 U. S. at p. 96.

The dissent by Mr. Justice Frankfurter, joined by Mr. Chief Justice Vinson, Mr. Justice Jackson and Mr. Justice

Burton, recognized that a State could validly levy a tax upon a local incident although a part of interstate commerce, when the taxing power exerted by the State bears fiscal relation to privileges, opportunities and benefits given by the State, but dissented on the ground that "The record is barren of any indication that 'the taxing power exerted by the State bears fiscal relation to protection, opportunities, and benefits given by the State,' Wisconsin v. J. C. Penney . . ." 335 U. S. at p. 100.

The tax in question is not levied upon the privilege of engaging in interstate commerce. The operating incidence of the tax as found by the State courts is: ". . . In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipe line, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant."

The opinion of the Texas courts further stated: "That the gathering of gas, so defined, is a local activity within the State of Texas and not subject to repetition elsewhere is apparent and since appellees do not allege the statute to be discriminatory, . . ." *Calvert v. Panhandle Eastern Pipe Line Company*, 255 S. W. 2d 535. Page 39 of Appellant's "Statement as to Jurisdiction."

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The undisputed and unchallenged evidence adduced upon the trial of this cause takes from appellant the aegis of the "commerce clause."

(a) This evidence discloses that the very economic existence of appellant is dependent upon the privileges,

benefits and opportunities afforded by the State of Texas in the enforcement of its oil and gas conservation laws. Such evidence shows that the enforcement of such conservation laws has made it economically possible for appellant to be in business and makes it possible for it to remain in business for many years to come. From the evidence it is undisputed that if such oil and gas conservation laws were repealed, or there was no enforcement of such laws, those engaged in the transmission of gas would lose their investments; and the recently built pipe lines which have not been paid out could never be amortized. In addition, there would be a great deal of suffering on the part of the consumers of such gas in that their source of supply would last but a short period of time. (S. F. 84-86).

(b) The State of Texas exercises control and jurisdiction over the drilling, completing and production of oil and gas wells and over the plants that extract gasoline or other liquid hydrocarbons from gas; and neither the Congress of the United States, the Federal Power Commission nor any other Federal agency has by any law, rule or regulation exercised any control or jurisdiction over such activities. (Michigan-Wisconsin, S. F. 34-35).

(c) One of the primary functions of the Railroad Commission of Texas in the enforcement of the Texas Oil and Gas Conservation statutes is to assure to the consumers of gas, in both interstate and intrastate commerce, an adequate supply of gas to supply their demands. (Michigan-Wisconsin, S. F. 46). One of the means by which this is accomplished is the practice of allowing the purchasers of gas to make "nominations." Mr. Murray, a petroleum engineer by profession and a member of the Railroad Commission, testified in reference thereto as follows: "I consider the right to make nominations an extremely valuable privilege to the gas purchasers, so valuable that I don't think they could operate without that privilege." He further stated in substance that the Texas Railroad Commission has the arduous task of administering the

practice of nominations. (Michigan-Wisconsin, S. F. 151). This testimony is uncontradicted and unchallenged.

(d) The Texas Legislature has enacted Article 6408-14, V. C. S., known as the "over and under six months balancing provision", for the special benefit of appellant and other pipe line companies. Mr. Murray testified in reference thereto as follows: "... the Legislature specifically for the benefit of the pipe lines passed an over and under six months balancing provision . . . affording these various pipe lines serving a single field the ability to get gas whenever their particular customers demand it and I do consider that a very valuable right and privilege to the gas companies." (Michigan-Wisconsin, S. F. pp. 78-79).

(e) The Texas gas conservation laws culminated in maximum benefits to appellant and other pipe line companies at the outlet of the gasoline plants, (Michigan-Wisconsin, S. F. 85) at which point this appellant consummates its purchase of the gas.

(f) The Texas Legislature exempted from the tax gas taken or retained for the manufacture of carbon black. The manufacturers of carbon black do not receive the benefits from the conservation statutes. In fact, the conservation statutes are putting them out of business. (Mr. Murray's testimony; Michigan-Wisconsin, S. F. 142-148). So it is evident that the legislature in passing this taxing act, did so for the purpose of requiring those who receive the benefits of our gas conservation statutes to pay their way and exempted those who do not receive such benefits.

The Court of Civil Appeals in this case found from the above undisputed evidence as well as other evidence in the record that the tax levied by Article 7057f is "fairly commensurate with the protection and benefits conferred by the State upon those engaged in the occupation described." 255 S. W. 2d at page 546; page 42 of Appellant's "Statement as to Jurisdiction."

There is no possibility of discrimination against interstate commerce under Article 74057f, either on the face of the statute or in its practical operation. The tax is placed upon the privilege of engaging in the business of taking or retaining possession of the gas for transmission, a local activity; and such tax is measured by the amount of gas taken or retained. The incidence and amount of the tax are in no way governed by a determination of whether the gas will be transmitted in intra or interstate commerce, or whether it is taken or retained for further processing. The stipulations show that approximately forty per cent of the revenue from this tax comes from those taking or retaining possession of gas for intrastate consumption. (Michigan-Wisconsin, S. F. 39).

Likewise, there is no possibility of the same activity taxed by the State of Texas being validly taxed by other states, thus giving rise to a "multiple burden" on interstate commerce which again would have the effect of unduly burdening that commerce. *Gwin, White, Prince v. Henneford*, 305 U. S. 434 (1939).

The activity taxed by the State of Texas is conditioned upon the gas being produced in Texas, and is the "first taking or retaining" of possession within this State after processing within this State. Neither the production nor the "first taking or retaining" of possession has any relationship to any other State which would give rise to this same tax by another State.

Further, the tax must not be an undue burden on interstate commerce. Appellees admitted in open court upon trial of these cases that there was no undue burden, except to the extent that any tax placed directly upon interstate commerce is an undue burden.

The tax was not challenged upon the ground that there is no proper ratio between the amount of the tax and the protection, benefits and opportunities afforded by this State.

The tax is a revenue tax, and has not been challenged as an attempt to place an embargo on interstate commerce. Finally, there has been and could be no contention that the State of Texas has no real interest in the subject matter here involved. Certainly the State of Texas has a vital interest in requiring each and every segment of her economy to share the burden of the cost of State government.

WHEREFORE, Appellees respectfully move the Court to dismiss this appeal, or, in the alternative, to affirm the decree of the Court of Civil Appeals heretofore entered herein.

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Appellant.

v.

**ROBERT S. CALVERT, COMPTROLLER OF PUBLIC
ACCOUNTS, ET AL.,**
Appellees.

Nos. 200, 201

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant.

v.

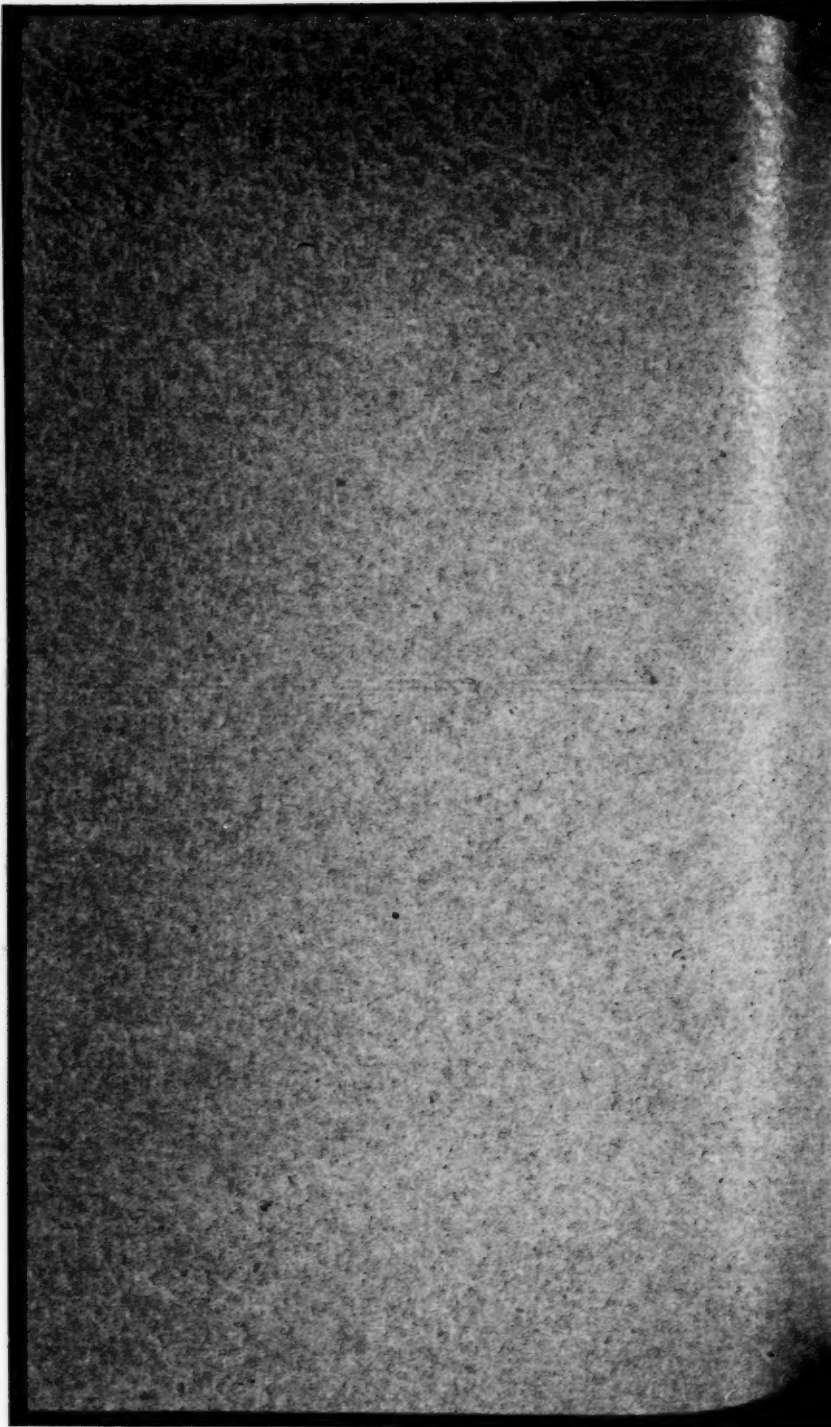
**ROBERT S. CALVERT, COMPTROLLER OF PUBLIC
ACCOUNTS, ET AL.,**
Appellees.

BRIEF FOR APPELLEES

✓ **JOHN BEN SHEPPERD**
Attorney General of Texas

140 **W. V. GEPPERT**

WILLIAM W. GUILD
Assistant Attorneys General
Attorneys for Appellees



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IN THE
Supreme Court of the United States
OCTOBER TERM, 1953

Nos. 198, 199

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
Appellant,
v.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC
ACCOUNTS, ET AL.,
Appellees.

Nos. 200, 201

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,
v.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC
ACCOUNTS, ET AL.,
Appellees.

BRIEF FOR APPELLEES

Statement of the Case

The appellees are duly elected, qualified and acting officials representing the State of Texas in their official capacities. The appellants, referred to as pipe line companies, have omitted essential facts and, in some instances, have misstated the facts of record.

For the purpose of clarifying these matters, appellees now set out their own statement of the case.

In the last decade the vast Texas gas fields have been converted more and more to producing cheap and convenient fuel for eastern and midwestern consumers. The gas, long used for fuel intrastate and for the production of carbon black, is now dedicated to a great extent to the use of the multi-million dollar interstate pipe lines.

The State of Texas, over a period of years, through legislative enactments, commission rulings and supervision, and the incurring of burdensome expenses, has effected gas conservation. It has been stipulated as part of this record that, except for statutory regulation, unlimited drilling of Texas gas fields would quickly drain the gas reserves dedicated by contract to the pipe line companies (R. 118). Thus unlimited drilling would put the pipe line companies out of business. The legislatures of Texas have endowed the Railroad Commission of Texas with discretionary authority to effectuate gas conservation. Mr. Murray, one of the three commissioners, testified at the trial that *one of the primary functions of the Railroad Commission was and is to assure an adequate supply of gas to the consumers within and without the State* (R. 130). In addition to the "over and under statute," which was enacted for the special benefit of the pipe line companies and their consumers, the Commission has evolved the efficient practice known as "nominations." It would not be feasible for the interstate pipe line companies to operate without either the "over and under statute" or the "nomination" procedure (R. 156).

In addition to gas field conservation practices which result in material benefits to the pipe line companies (R. 142), the Railroad Commission has been responsible for approximately a 50% increase in the supply and the reserves of gas dedicated to the pipe lines (R. 143). Not all gas is produced from gas wells. There are approximately 8,275 gas wells and 76,770 oil wells throughout Texas supplying gas to pipe lines (R. 125). It is a natural phenomenon that gas is produced during the production of oil. Gas so produced is referred to as casinghead gas. Until the State took affirmative action against oil producers who were flaring such gas, only a small portion of the casinghead gas was utilized. In many instances the Railroad Commission shut down whole oil fields in order to effect a use of this gas (R. 132). The pipe lines were the beneficiaries of this new supply and potential reserve (R. 132, 143), and they secure approximately three billion cubic feet of casinghead gas daily as a result of Railroad Commission action (R. 132).

The net result of the State's activities has been to give impetus to the construction of interstate pipe lines (R. 142). The increase in the gas available to the pipe lines assures them of a more profitable amortization of their capital investment (R. 142-143, 146), and consumers of gas are insured a continuous and non-erratic supply of fuel for a longer period of time (R. 145-146). Neither the Congress of the United States, the Federal Power Commission nor any other federal agency has assured the consumer or pipe line companies these benefits by any law, rule or regulation (R. 123).

The West Texas Hugoton Gas Field is the scene of the appellant pipe line companies' taxable activity. The gas in this field contains certain valuable liquefiable hydrocarbons, *i.e.*, gasoline, kerosene, butane, etc., which are extracted at gasoline plants. This gas is also the source from which carbon black is produced. The carbon black industry wastefully burns the gas in order to produce the carbon black (R. 188-189). The operators of gasoline plants, in the absence of the Texas conservation laws, in order to realize quick profit from larger quantities of gasoline, could produce the gas wells at 100% open flow and could flare the residue gas, thereby draining the gas from the acreage dedicated to the pipe lines (R. 146). The pipe line companies and their consumers, from the uncontradicted evidence, are the major recipients of the benefits derived from the Texas conservation laws and regulations (R. 158). Appellants' statements to the contrary are incorrect and in the face of the record. (Appellants' Br. 50-55). Contrary to appellants' assertion that the competing carbon black industry benefits along with the pipe lines from the Texas laws and regulations (Appellants' Br. 53), the established fact is that conservation is putting the carbon black industry out of business (R. 188-189).

Appellant pipe line companies purchase all of their gas at the outlet of local gasoline plants, except the portion produced by Panhandle-Eastern. Michigan-Wisconsin purchases all of its gas at the outlet of one of Phillips Petroleum Company's gasoline plants. The voluminous contracts executed between the pipe lines and the producers favor the

pipe line companies (R.51). Prominent features of these contracts are the dedication of the gasoline plants' residue gas to the pipe lines at fixed prices. These private contracts in fact prevented the State from increasing the production tax (R. 51). The Texas Legislature, solicitous of the committed producers (R. 51) and mindful of the Texas conservation laws, in lieu of an increased production tax, placed the incidence of the tax upon gas first taken or retained after the gasoline or liquid hydrocarbons are separated from the gas. The intrastate pipe line or intrastate consumer pays the same tax rate per cubic foot of gas consumed as does the interstate pipe line or interstate consumer. In fact, forty per cent of the gas gathering tax is presently being paid by the Texas consumer and sixty per cent of the tax is paid by the consumers in thirty-eight other states. Texas consumers, therefore, pay a larger proportion of the taxes collected under the Act than do the consumers in any other state. This fact alone refutes appellants' statement that the gas gathering tax was directed solely at interstate industry and at consumers in other states. Appellants have passed on to their consumers the amount of this tax. The average consumer pays less than three-fourths of one cent per month more for his gas. (This computation is based upon the amount of tax paid per month under protest [R. 4, 19] and the number of consumers [R. 2, 13].) The Court of Civil Appeals found, as a matter of fact, that this gas gathering tax was fairly commensurate with the benefits conferred by the State (R. 53).

A tax upon the producer is unquestionably valid. *Hope Natural Gas v. Hall*, 274 U.S. 284 (1927). Had the State of Texas exercised its established prerogative of increasing the tax upon the producer of the gas, the pipe line companies would have been contractually obligated to pay three-fourths of such increase (R. 255). Except for the contract binding the producer to absorb one-fourth of any production tax increase, any increase would be passed on by the producer, under ordinary industrial recoupment practices, to the pipe lines and thence to their consumers. It is elementary that if the producer is required to absorb even a part of a tax he has suffered a loss to his net profit just as if he had been required to sell the gas at a lower price. As observed in *Cities Service Gas Co. v. Peerless*, 340 U.S. 179 (1950), loss of profit to the producer would necessitate stopping production of gas at a date earlier than anticipated, ultimately resulting in waste, and adversely affecting gas conservation generally. In the companion case, *Phillips Petroleum Co. v. Oklahoma*, 340 U.S. 190 (1950), this Court upheld the validity of an Oklahoma price fixing regulation requiring the gas to be sold at a higher price so as to insure more profit to the producer and thereby further gas conservation. The *Phillips* case was concerned with the same gas field involved in the case at bar, and a good portion of this Oklahoma gas is processed at the same gasoline plants and sold together with the gas in the case at bar to these appellant pipe lines (R. 3, 16). Therefore, the Texas Legislature, by avoiding an increased production tax

which would result in a loss to the producer, has effected gas conservation just as has the State of Oklahoma by its price fixing measure.

The Phillips Petroleum Company's Hansford gasoline plant is one of the gasoline plants from which Panhandle Eastern Pipe Line Company obtains its gas. Of the gas obtained from this particular gasoline plant, 55% to 60% is produced in the State of Oklahoma (R. 16). The gas being purchased by Michigan-Wisconsin Pipe Line Company comes from the Phillips' Sherman plant, and 7% of this gas is produced in Oklahoma (R. 3). This gas which is produced in Oklahoma, processed in Texas gasoline plants, and taken or retained by pipe line companies in Texas, is not subject to the Texas gas gathering tax. But under the holding in the *Phillips* case, the sale of this Oklahoma gas at the outlet of the Texas gasoline plants is subject to Oklahoma's price fixing regulation.

The type of "gathering" tax here in litigation is not new. A similar temporary "gas gathering" tax was passed by Louisiana in 1940, and was extended every two years until made permanent in 1948. La. Gen. Statutes, 8787.18, et seq.

Jurisdictional Question

Appellee's motion to dismiss or affirm should be granted for the reason that the finding of the state court as to the operating incidence of the tax is "binding on the Supreme Court" and, in light of such finding, it is idle for appellants to contend that the tax is levied upon either of the seven events alleged by them in their protests, in that under the

Texas protest statute the only issues involved in the trial of these cases have been foreclosed by the state court's finding as to what the tax in fact is levied upon.

In our motion to dismiss or affirm we pointed out that the federal question relied upon by appellants was unsubstantial in character, in that the question urged for reversal has been plainly foreclosed by prior decisions of this Court. We now point out (1) that grounds presently relied upon by appellants in these appeals were not issues in the State courts, and (2) that every ground relied upon by appellants that was in issue in the State courts has been plainly foreclosed by the finding of the State court as to the operating incidence of the tax.

Appellants in their protest and their pleadings set out only the following grounds and reasons why they contend that this tax violates the Commerce Clause:

That the tax is levied on:

(1) "The purchase of gas for immediate transportation in interstate commerce."

(2) "The privilege of purchasing gas in interstate commerce."

(3) "The entry of gas into interstate commerce."

(4) "The activity or occupation of engaging in interstate commerce."

(5) "The act of taking gas into interstate commerce."

(6) "A movement of goods in interstate commerce during the course of such commerce."

(7) "The privilege of transporting goods in interstate commerce." (R. 7, 8, 23).*

We point out that appellants do not allege in their protests that the tax is an undue burden on interstate commerce, that it is discriminatory against interstate commerce, or that it subjects interstate commerce to a "multiple burden." In this appeal, however, they are contending that this tax is an undue burden, that it is discriminatory and that it subjects interstate commerce to "multiple burdens." These issues were not involved in the lower courts, hence such contentions are not involved on this appeal. These new grounds or reasons cannot be involved here because they were waived under the provisions of Article 7057b, the Texas protest statute.

This protest statute gives a taxpayer permission to sue the State when the taxpayer pays the taxes under protest and accompanies such payment with a written protest, "setting out fully and in detail each and every ground or reason why it is contended that such tax is unlawful or unauthorized." Suit then must be brought against the State within ninety days to recover such protested payments. This protest statute specifically provides as follows: "The issues to be determined in such suit shall be only those arising out of the grounds or reasons set forth

*The seven events listed were lifted from Michigan-Wisconsin's protest. They are identical with Panhandle-Eastern's allegations in its protest. However, Panhandle-Eastern made the following additional statements in its protest: that the tax is levied on the "retaining and continuing the transportation of gas which is in interstate commerce," and that the tax is levied upon the "retaining gas already in commerce," as to the gas that was produced by it. (R. 23.)

in such written protest as originally filed." Appellants in their written protests did not state any grounds or reasons as to why this tax violated the Commerce Clause except that it was levied upon one or more of the seven events above enumerated. We point out that they did not state as a ground or reason in their protests that this tax was an undue burden on interstate commerce or that it was discriminatory or would subject them to a "multiple burden."

The Texas courts have consistently held, in construing this protest statute, that a taxpayer cannot recover on grounds or reasons not set forth in the written protest. *Community Public Service v. James* 167 S.W. (2d) 588 (1942); *Ramsey v. Investors Div. Services*, 248 S.W. (2d) 263 (1952). This fact was recognized and relied upon as definitely limiting the scope of the question passed on in the State courts. As stated by the Court of Civil Appeals:

"That the gathering of gas, so defined, is a local activity within the State of Texas and not subject to repetition elsewhere is apparent and since *appellees do not allege the statute to be discriminatory*, the sole question is whether such local activities are so closely related to and such an integral [fol. 57] part of the interstate business of appellees who transport gas in interstate commerce as to be within the scope of the Commerce Clause of the Constitution." (R. 50).

In *Memphis Gas Company v. Stone*, 335 U.S. 80, at 84 (1948), the Court stated:

"The state Supreme Court [of Mississippi] construed the tax as 'an exaction . . . as a recompense

for . . . protection of . . . the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State. As we are bound by the construction of the state statute by the state court, it is idle to suggest that the tax is on 'the privilege of engaging in interstate business.' . . ."

Also, in *Spector Motor Service v. O'Connor*, 340 U.S. 602, at 605 (1950), the Court turned to the opinion of the State court to determine the "all-important operating incidence of the tax." In fact, this Court has consistently held that it is bound by the finding of the State court showing exactly what the State is taxing.

The State court in this case found the incidence of the tax to be:

" . . . the first taking or the first retaining of possession of gas produced in Texas for transmission whether through a pipe line, either common carrier or private, or otherwise after severance of such gas, and after the passage of such gas through any separator, drip, trap, meter or other method designed to separate the oil therefrom. In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipe line, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant." (R. 50).

The State court also found that the processing of the gas, the taking or retaining of the gas and its transmission are successive and not simultaneous acts (R. 53).

In the light of the above findings it is idle to suggest or contend that the tax is levied upon either one or more of the events alleged by appellants in their protests. Appellants' only issues, as made by them in the State courts, as to why this tax violated the Commerce Clause were that this tax statute was levied upon one or more of the seven events set forth in their protest. The State Court has held that this tax act is *not* levied on:

(1) "The purchase of gas for immediate transportation in interstate commerce."

(2) "The privilege of purchasing gas in interstate commerce."

(3) "The entry of gas into interstate commerce."

(4) "The activity or occupation of engaging in interstate commerce."

(5) "The act of taking gas into interstate commerce."

(6) "A movement of goods in interstate commerce during the course of such commerce."

(7) "The privilege of transporting goods in interstate commerce;"

but is levied only on the local incidence of taking or retaining gas for further processing or transmission.

Therefore, every issue properly involved in this case has been foreclosed by the finding of the State

court as to what the State is taxing; in other words, the operating incidence of the tax. Therefore nothing remains upon which to predicate this appeal.

WHEREFORE, appellees respectfully move the Court to dismiss this appeal, or, in the alternative, to affirm the decree of the Court of Civil Appeals heretofore entered herein.

Although appellees are thoroughly convinced that there is no merit or substance in appellants' appeal for the reason that such appeal does not properly present a question, either federal or otherwise, for this Court's determination, we will further show that on the merits the judgments of the State court should be affirmed.

Summary of Argument

1.

Although a person is engaged solely in interstate commerce, a State may validly levy a nondiscriminatory tax upon a local incident or activity of the interstate business which is separate and apart from the actual flow of commerce, provided the taxpayer is receiving from the State levying the tax, benefits, protection or opportunities which bear a fiscal relationship to the tax. *Memphis Gas Company v. Stone*, 335 U.S. 80 (1948); *Richfield Oil Corp. v. State Board*, 329 U.S. 69 (1946); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940); *McGoldrick v. Berwind-White Coal Co.*, 309 U.S. 33 (1940); *Western Live Stock v. Board of Revenue*, 303 U.S. 250 (1938).

(1) The appellant pipe line companies' statements and arguments in their brief to the effect that they receive no "benefits, protection or opportunities" from the laws and regulations of Texas are the very *antithesis* of the uncontradicted facts in the record. Appellees established in the trial of this cause that the pipe line companies were the major recipients of the benefits from Texas conservation laws and regulations. Further, it was shown without dispute that except for these conservation laws, the multi-million dollar interstate pipe line companies could not operate or exist. As a direct result of the Texas conservation measures, the pipe lines and their consumers have reaped manifold benefits and profits. The Court of Civil Appeals after thoroughly reviewing the Statement of Facts, found that "the tax levied was fairly commensurate with the protection and benefits conferred upon those engaged in the taxed occupations."

(2) The incidence of the tax is laid upon the local activity of taking gas produced in Texas for the purpose of transmission. That there is no appreciable lapse of time between processing of the gas, the taking or retaining of the gas and its transmission, is unimportant since these are *successive* and not simultaneous acts (R. 53). It is a natural phenomenon that the gas once produced from its natural storage in the earth must be kept moving. The appellants, by a facile argument attribute to that movement the term "interstate commerce," and thereby seek to avoid the fact that the taking or retaining of Texas gas in Texas is a local activity. The incidence of this gas gathering tax is entirely dis-

tinct from the incidence of a tax placed directly upon the privilege of engaging in interstate commerce. The principles involved in the case at bar are indistinguishable from those in *Chassanoil v. Greenwood*, 291 U.S. 584 (1934), *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923), and *McGoldrick v. Berwind-White Co.*, 309 U.S. 33 (1940), in which this Court upheld State tax statutes despite contentions that they were violative of the Commerce Clause of the Constitution.

(3) The tax statute, denominated "the gas gathering tax," is painstakingly drawn so that equality is its theme, both on its face and in its practical operation. The out-of-state consumer does not pay any more tax per cubic foot of gas consumed than does the intrastate consumer. The entire gas gathering tax statute manifests an evident intent that there be no discrimination between out-of-state consumers, inter se, or between out-of-state and intrastate consumers. The fact that some producers of gas do not sell the gas to transmitters, but transmit their own produced gas, requires the tax to be levied on the "taking or retaining" rather than upon the sale *in order that all "takers" and all consumers of gas bear their fair share of the tax imposed as a recompense for the benefits afforded by the State.*

(4) There is no possibility of the gas gathering activity taxed by the State of Texas being validly taxed by other States; hence, upholding the validity of this tax could not lead to a "multiple burden" on interstate commerce. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). The activity taxed

and the benefits bestowed by the State of Texas could not occur in or be bestowed by any other state. All the events upon which the tax is conditioned, the production of the gas, the separation of the gasoline and liquid hydrocarbons from the gas, and the first taking at the outlet of the processing plants, occur in Texas and nowhere else.

(5) Appellants in their brief, by the use of isolated quotations torn from the proper perspective of their individual judicial settings, have challenged the controlling authorities and constitutional principles which uphold this tax statute.

(6) The reasoning and rationale of the Court's opinion as well as the dissenting opinion in the recent case of *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952), clearly validates this gas gathering tax as not being an undue burden on interstate commerce.

Summary of Argument

II.

There are many decisions by the Supreme Court of the United States that would support a holding that interstate commerce does not begin until after the gas has been "taken" and has thereafter begun its final journey out of this state. *Chassanoil v. Greenwood*, 291 U.S. 584 (1934); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923).

ARGUMENT

I.

Controlling Principle

Although a person is engaged solely in interstate commerce, a state may validly levy a nondiscriminatory tax upon a local incident or activity of the interstate business, which is separate and apart from the actual flow of commerce, provided the taxpayer is receiving from the state levying the tax, benefits, protection or opportunities which bear a fiscal relationship to the tax. Memphis Gas Co. v. Stone, 335 U.S. 80 (1948); Richfield Oil Corp. v. State Board, 329 U.S. 69 (1946); Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940); McGoldrick v. Berwind-White Coal Co., 309 U.S. 33 (1940); Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938).

Appellants, throughout the trial and appellate proceedings in the state courts, were dogmatic in their assertion that the benefits afforded them could never warrant the levy of a state tax upon any part of their interstate business. In their brief in this Court, the pipe line companies, for the first time, recognize the soundness of the above-stated controlling principle (Appellants' Br. 46). This controlling principle is applicable to the Commerce Clause. It is controlling in the present instance because the evidence establishes that the appellants receive benefits, protection and opportunities bearing a fiscal relationship to the tax and because this

tax is nondiscriminatory and is laid upon a local incident or activity.

Appellants would relegate and limit the application of the above-stated principle to those cases wherein the State's power to tax has been attacked as violative of the Due Process Clause. Appellees submit that appellants' position is not supported by the cases. In *Memphis Gas Co. v. Stone*, *supra*, the State of Mississippi levied a franchise tax upon an interstate pipe line company whose only activities in the State were the maintaining and manning of its pipe line and the operation of a pump station. The tax was attacked on the ground that it violated the Commerce Clause. This Court held the Mississippi franchise tax valid. The opinion by Mr. Justice Reed stated the following reason for so holding:

"We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, *gives protection* and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business." (335 U.S. at 96) (Emphasis supplied.)

The dissenting opinion recognized the above principle, but the dissenters were of the opinion that there were, in fact, no benefits.

In *Richfield Oil Corp. v. State Board*, *supra*, the Court held a California retail sales tax violative of

the Import-Export Clause of the Federal Constitution. The Court discussed the Commerce Clause and its relationship to state-enacted taxes.¹ This discussion expunges appellants' theory that this Court

¹ "The two constitutional provisions, while related, are not coterminous. To be sure, a state tax has at times been held unconstitutional both under the Import-Export Clause and under the Commerce Clause. *Brown v. Maryland*, 12 Wheat. 419; *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292. But there are important differences between the two. The invalidity of one derives from the prohibition of taxation on the import or export; the validity of the other turns nowise on whether the article was, or had ever been, an import or export. See *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 656-66, and cases cited. Moreover, the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. It is well established that the Commerce Clause is a limitation upon the power of the States, even in absence of action by Congress. *Southern Pacific Co. v. Arizona*, 325 U.S. 761; *Morgan v. Virginia*, 328 U.S. 373. But the scope of the limitation has been determined by the Court in an effort to maintain an area of trade free from state interference and at the same time to make interstate commerce pay its way. As recently stated in *McGoldrick v. Berwind-White Coal Mining Co.*, *supra*, p. 48, the law under the Commerce Clause has been fashioned by the Court in an effort 'to reconcile, competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed.' *That accommodation has been made by upholding taxes designed to make interstate commerce bear a fair share of the cost of the local government from which it receives benefits* (see e.g. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254-55, and cases cited; *McGoldrick v. Berwind-White Coal Mining Co.*, (*supra*) and by invalidating those which discriminate against interstate commerce, which impose a levy for the privilege of doing it, which place an undue burden on it. *Adams Mfg. Co. v. Storen*, 304 U.S. 397; *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434; *Best & Co. v. Maxwell*, 311 U.S. 454; *Nippert v. Richmond*, 327 U.S. 416." (329 U.S. 75-76) (Emphasis supplied.)

does not consider the benefits received by the taxpayers when the constitutional complaint is based on the Commerce Clause.

(1) As found by the State Court, this tax is fairly commensurate with the protection and benefits conferred by the state upon those engaged in the taxed occupation.

The opinion of the Court of Civil Appeals sets out its finding that the gas gathering tax is fairly commensurate with the protection and benefits conferred upon the Appellant pipe line companies.²

These companies claim they do not receive any special benefits from the Texas conservation laws except indirectly. Appellees will show from the record that the undisputed and unchallenged evidence is contrary to the pipe line companies' claim.

The evidence discloses that the very economic existence of the appellants and other interstate pipe line companies is dependent upon the privileges, benefits and opportunities afforded the pipe line companies by the State of Texas. The evidence shows that Texas, in the enforcement of its oil and gas conservation laws, has made it economically possible for these appellants to be in business and to remain in business for many years to come. The fact is undisputed that if such oil and gas conservation laws

² "We believe that the tax levied by this statute is fairly commensurate with the protection and benefits conferred by the State upon those engaged in the occupation described." (R. 53.)

were repealed or if there were no enforcement of such laws, those engaged in the business of transmitting gas, especially the interstate transmission of gas, would lose their investments. In addition, there would be a great suffering on the part of the consumers of such gas in that their source of supply would last but a short time.³

It is difficult to reconcile appellants' statements that they receive no special benefits with the testimony of Mr. Murray, a qualified and recognized petroleum engineer and a member of the Railroad Commission of Texas. Mr. Murray testified that the recipients of the maximum benefits of the Texas conservation laws are the pipe line companies.⁴ It

³ Commissioner Murray's undisputed testimony was, in part, as follows: "A. If all the oil and gas conservation laws were repealed or there was no enforcement of the laws, the effect on these pipelines, in my judgment, would be to cause great loss of investment. I don't think any of the recently built pipelines which have not been paid out would ever be amortized, and there would be also a great suffering on the part of the consumers who are dependent upon these sources of supply of gas. While that is a very great concern to us, it may not be material here, and I base that opinion both on my predictions of what would happen and my recollection of what was happening before the laws were passed and the regulations enforced." (R. 145-6.)

⁴ "A. Well I would say obviously the maximum benefit would be at the outlet of the plant, because the plant itself operates under the Commission's conservation regulations, and benefits accrue from these regulations of the operation of the plant, and so my answer the point at which the maximum benefits occur would be after the gas has been finally processed through the plant, at the outlet of the plant." (R. 158.)

Note: The above reference to benefits is to benefits derived from enforcement of the conservation laws. The pipe line companies take the gas at the outlet of the plant referred to in the above testimony.

is also difficult to reconcile appellants' contention with Mr. Murray's statements to the effect that except for the conservation statutes and regulations presently in effect, no major outlay of capital for the construction of interstate pipe lines would be feasible (R. 156).

Further, the State's efforts in behalf of conservation have made available to the pipe lines a new source of supply—the casinghead gas resulting from the production of oil from 76,770 oil wells in Texas. These wells presently make available to the pipe lines an additional three billion cubic feet of casinghead gas *daily* (R. 132).

Appellants in an attempt to convince the Court that they receive no benefits from the conservation and proration statutes of Texas state on page 50 of their brief that:

“The Texas statute by which the conservation of oil and gas is accomplished shows on its face that it was enacted for the purpose of preventing waste and protecting the correlative rights of producers (among themselves) by compelling ratable production. The history of the industry shows that such statutes and regulations issued thereunder are for the protection of producers *against each other* in order that all producers may have an opportunity to produce their fair shares of the total quantity of recoverable oil and gas in a common pool. . . .”

Then, on pages 52-53, the following erroneous statement appears:

“However, the pipe line companies are not the special beneficiaries under these laws. They receive

incidental benefits from the prevention of waste, as do all other purchasers of gas. *But they benefit not at all from the proration regulations.* The producers benefit primarily and principally from the prevention of waste; and they alone benefit from proration. . . ." (Emphasis added.)

The proration statutes assure appellants that producers (other than producers of gas for appellants) in the gas field from which appellants obtain their gas will neither waste nor voraciously produce gas for their own purposes, thereby draining the underground gas from the acreage dedicated to the appellants (R. 146). Except for the proration statute, appellants, who are receiving the full amount of their delivery capacity, would have to "stand by" and watch the drainage of their dedicated gas acreage.

Each appellant has but one pipe line in which to transmit the gas after taking possession of it. The proration law limits the producers in appellants' gas field to a production rate of 25% of the daily open flow capacity of each well (R. 91, 92). In the absence of this limitation, the only way appellant pipe line companies could secure their fair share of the gas in the common pool would be to build additional pipe lines. The cost of a pipe line is from sixty to seventy-five thousand dollars per mile (R. 215). Considering the distance between the gas field and appellants' markets, each additional pipe line would require an investment of over one hundred million dollars. These facts are only a part of the evidence refuting appellants' statements.

The three-member Railroad Commission of Texas is the agency empowered by the Texas Legislature

to administer the extensive conservation laws governing the oil and gas industry that is utilizing the most valuable resources of the State. The Railroad Commission has conducted these functions for more than thirty years. Mr. Murray, a member of this Commission, testified that one of the primary functions of the Railroad Commission is to assure the consumers *without the State*, as well as consumers within the State, an adequate supply of gas available to them at all times (R. 130).

Appellants make the unsupported statement in their brief that the carbon black industry benefits by the conservation laws to the same extent as appellants. The simple truth is that the carbon black plants are appellants' competitors for the gas in the West Texas Hugoton Gas Field. And the evidence is clear that carbon black plants do not benefit from conservation laws but that such laws are putting them out of business.⁵

That the Texas Legislature in passing this tax act believed that the pipe lines and their customers were receiving benefits and protection from the State, is evidenced by the fact that the Legislature exempted

⁵ Mr. Murray testified that: "The channel black plants say conservation is about to put them out of the picture." (R. 188.)

"... They [carbon black plants] don't actually benefit. It would seem reasonable to say they would, but the very conservation that would make more gas available for the carbon black plants, enables the pipe lines, by paying a high price, to take it away from the carbon black plants, and pretty soon the carbon black plants are going, the channel black plants are going out of business. They are not building any new ones. They are just waiting for the old ones to wear out." (R. 189.)

gas taken for the manufacture of carbon black—an industry which is injured rather than benefited by Texas conservation policies.

(2) The incidence of the tax is the local activity of taking gas, which is distinct and separable from the transmission as found by the state court when it stated that the processing of the gas, the taking of the gas and the transmission of the gas are successive and not simultaneous acts. (R. 53).

The tax act defines gathering as “the first taking or the first retaining of possession of gas produced in Texas for other processing or transmission.” Under the plain language used in the statutory definition of “gathering gas,” the taxable incident is the taking or retaining of the gas *for* the purpose of other processing or transmission. Gathering gas does not mean the first taking or retaining *and* the transmission of the gas. It is clear that the tax is levied only upon the privilege of engaging in the business of taking or retaining gas produced in Texas for the purpose of other processing or transmission. The State court held this to be the operating incidence of the tax (R. 50). The tax is due even though the gas is in fact never transported, as long as it was taken or retained for that purpose.

This Court has held that a sale or transfer of possession of goods immediately after or immediately prior to an interstate shipment is a local activity which can be segregated from the transportation movement and made the operating incidence of a State tax. *McGoldrick v. Berwind-White Co.*, *supra*; *Chassanoil v. Greenwood*, *supra*; *International Har-*

vester Company v. Department of Treasury, 322 U.S. 340 (1944); *Department of Treasury v. Wood Preserving Corp.*, 313 U.S. 62 (1941).

The local activity in the present case is the taking of possession of the gas; in fact, the operating incidence of the tax as to gas taken is the transfer of the possession of the gas. It is elementary that the delivery of personal property, that is, the taking possession thereof, is a constituent element of a sale. As pointed out, in the last preceding paragraph, this Court upon numerous occasions has permitted sales or transfers of property, both within the state of origin and the state of destination to be segregated for the purpose of state taxation, although technically in interstate commerce. If the whole sale can be segregated and made the operating incidence of a tax, we can conceive of no reason that would prevent a segregation for state tax purposes of a necessary and constituent element of the sale. In the *Berwind-White* case, *supra*, at 52, this Court stated: "As we have often pointed out, there is no distinction in this relationship between a tax on property, the sum of all the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements." One of the powers incident to ownership of property is the right to take possession.

The cases of *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923), and *Chassanoil v. Greenwood*, 291 U.S. 584 (1934), clearly reveal that a taking of possession of goods for immediate transmission in interstate commerce is a taxable activity.

As pointed out above, the statute in this case is denominated a "gas gathering tax." The tax is levied upon every person engaged in gathering gas produced in the State of Texas. The statute defines "gathering gas" to mean the *taking* or retaining of gas for the purpose of further processing or transmission. The state court has found that the taking of the gas and its transmission are successive and not simultaneous acts (R. 53). The incidence of the tax is upon the taking of the gas. That the gas is later transmitted interstate by appellants does not mean the tax is based upon this later transmittal. Gas taken for later intrastate transmission is taxable, and so is any gas taken for the purpose of transmission *even though never actually transmitted either intra or interstate.*

In the *Oliver Iron Mining Company* case, the taxpayer contested the validity of a Minnesota tax levied upon the mining of iron ore. The Court upheld the validity of the tax against the taxpayer's contention that it violated the Commerce Clause and held that the mining was an intrastate function. The only mining activity of Oliver Iron Mining Company was the taking of the ore from open pits by the use of a steam shovel, which shovel immediately transferred the ore into empty railroad cars.

The Oliver Iron Mining Company made the identical contention appellants make in this case. The Oliver Iron Mining Company claimed that the taking of the ore by the steam shovel and the placing of the ore into the empty railroad cars were simultaneous acts and that all of this operation constituted interstate commerce. As in the case at bar, the Iron Com-

pany established that the ore, while still a part of the ground, had been contracted and destined for an interstate movement. The Oliver Iron Company performed the same two activities the appellants perform: the taking and the transportation of a natural resource to fill existing contracts with consumers without the State. The incidence of the Minnesota tax and the incidence of the tax in this case is upon the taking of the natural resource. The Court, in the *Oliver Iron Company* case, stated that there was a practical continuity of movement of the ore but recognized that the mining, which under the facts constituted merely the taking of the ore, was separate and apart from the interstate transportation. The Court held that the tax on mining (taking) was a wholly intrastate function subject to state taxation.

Appellants admit, under the caption "Question Presented" on page 4, that they perform two activities: the receiving of gas and the immediate transportation of gas in interstate commerce.⁶ That the Texas statute uses the term "taking" of gas rather than a term such as "receiving" or "purchasing" of gas is of no significance except that the term "taking or retaining" was selected for the purpose of preventing an inequitable distribution of the tax among *the out of state and intrastate consumers* (*infra*, p. 33). The taking or receiving or buying of a natural resource or product within any state

⁶ Appellants' brief recites: ". . . for the privilege of receiving gas into their pipe lines within the State for immediate transportation in interstate commerce. . . ."

is not a fictitious intrastate activity. It is real and is recognized by the cases decided by this Court.

Appellants, on page 29 of their brief, state that the principle involved in the case at bar is in no wise different from the principle involved in a case in which a carrier receives possession of cotton at the platform of a compress. This court has spoken on this proposition. In *Chassanoil v. Greenwood*, 291 U.S. 584 (1934), a Mississippi city levied a tax upon the business of *buying* cotton. The taxpayer, Chassanoil, bought the cotton after it came off the compress. The cotton, prior to its purchase, had been contracted for interstate delivery; and, of the cotton so purchased, a portion of it went immediately into *interstate* transportation and the remainder later went into *interstate* commerce as per prior contract. Chassanoil contended that the cotton was in interstate commerce from the moment it was purchased by him. He contended that at the time of the purchase the cotton was destined for shipment to other states and that the tax was on the privilege of engaging in interstate commerce. That some of the cotton went immediately from the compress into interstate shipment in the *Chassanoil* case can not be denied. But the Court recognized the local activity of buying, which, under the facts, constituted a taking of the cotton, as distinguished from the transportation, and upheld the tax.

Appellees submit that there is no constitutional difference between the local activities of "taking" or "buying." The term "taking" was used in this gas gathering tax act for the sole purpose of assuring an equitable distribution of the tax among the

consumers of the gas, whether intra or interstate. The use of the terms "buy," "purchase" or "receive" would not and could not assure an equitable distribution among the users of gas (*infra* p. 33).

(3) This tax statute does not discriminate against interstate commerce either on its face or in its practical operation in that equality is the theme.

Appellants in their brief filed in this Court raise for the first time the issue that the gas gathering tax is discriminatory and subjects them to a "multiple burden." This contention is now the basis for their argument that the tax is an undue burden on interstate commerce (Appellants' Br. 30-38). This effort is a belated attempt to inject issues of discrimination and "multiple burden" when there is no legal justification for this Court to consider them. These issues were waived under the provisions of Article 7057b, Vernon's Civil Statutes, the Texas protest statute.

This protest statute gives a taxpayer permission to sue the state when the taxpayer pays the taxes under protest and accompanies such payment with a written protest, "setting out fully and in detail each and every ground or reason why it is contended that such tax is unlawful or unauthorized." Suit then must be brought against the state within ninety days to recover such protested payments. This protest statute specifically provides as follows: "The issues to be determined in such suit shall be only those arising out of the grounds or reasons set forth in such written protest as originally filed." Appel-

lants in their written protests did not state as a ground or reason for protest that this tax was discriminatory or would subject them to a "multiple burden." (R. 6, 7, 8, 23, 24.) The Texas courts have consistently held, in passing upon this protest statute, that a taxpayer cannot recover on grounds or reasons not set forth in the written protest. *Community Public Service v. James*, 167 S.W. 2d 588 (1942); *Ramsey v. Investors Div. Services*, 248 S.W. 2d 263 (1952). Neither did either appellant allege in its petition that this tax was discriminatory or that it subjected interstate commerce to a "multiple burden." (R. 1-9, 11-26.) This fact was recognized and relied upon as definitely limiting the scope of the question passed on in the state courts. As stated by the Court of Civil Appeals:

"That the gathering of gas, so defined, is a local activity within the State of Texas and not subject to repetition elsewhere is apparent and *since appellees do not allege the statute to be discriminatory*, the sole question is whether such local activities are so closely related to and such an integral [fol. 57] part of the interstate business of appellees who transport gas in interstate commerce as to be within the scope of the Commerce Clause of the Constitution." (R. 50.) (Emphasis added.)

We submit that the issues of discrimination and "multiple burden" have been waived by appellants and that such issues are not properly before this Court. However, appellees will now show the Court that the gas gathering act does not in fact discriminate against interstate commerce either on its face or in its practical operation. On page 35 of this brief

we will demonstrate that this taxing act does not subject interstate commerce to a "multiple burden."

This Court has uniformly held that certain types of state taxes, if permitted to stand, would so impede or destroy interstate commerce as to call for their condemnation as forbidden interference. Such are the taxes which impose a levy for the privilege of engaging in interstate commerce. See *Spector Motor Service v. O'Conner*, 340 U.S. 602 (1951); *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947). Likewise forbidden are taxes which discriminate against interstate commerce. *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952); cf. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). An unapportioned gross receipts tax is discriminatory against interstate commerce in that it subjects interstate commerce to multiple burdens. *Gwin, White & Prince v. Henneford*, 305 U.S. 434 (1939). Such taxes impose a burden, which intrastate commerce does not bear, merely because interstate commerce is being done, thus placing it at a disadvantage in comparison to intrastate business. See *McGoldrick v. Berwind-White Co.*, 309 U.S. 33 (1940).

The present tax as applied to appellants is without the possibilities of such consequences. In fact, equality is its theme. It does not aim at or discriminate against interstate commerce. It is laid upon every taker of gas which is produced in Texas, at the outlet of processing plants, for the purpose of further processing or transmission, regardless of whether the gas is thereafter transported in intrastate or in-

terstate commerce. Its only relation to commerce arises from the fact that immediately following such taking or transfer of possession, the gas will move in either intrastate or interstate commerce. *Chassanoil v. Greenwood*, 291 U.S. 584 (1934).

The use of the terms "taking," "take," or "retain" by the Legislature, rather than "sale" or "purchase" are used to prevent inequality. The Legislature was cognizant of the fact that in the gas industry some pipe line companies produce and retain the gas for transmission as well as purchase gas produced by others. Panhandle Eastern Pipe Line Company, one of the appellants, is such a pipe line company in that it both produces and purchases gas. Michigan-Wisconsin Pipe Line Company, the other appellant, does not produce any part of the gas it transports. Thus it is evident that had the tax been levied upon the "purchase" or "buying" of Texas gas, the tax would have created an inequality not only between appellants but also between their respective consumers. A large portion of the gas taken by Panhandle Eastern is produced by Panhandle Eastern and would never be taxed under a purchaser's or buyer's tax statute. Whereas, Michigan-Wisconsin Pipe Line Company would have to pay a tax on all the gas it acquired for the reason that it purchases all of its gas. The efforts of the Texas Legislature to do equity is conspicuously ignored by these appellants.

It has long been settled that a state can levy an occupation tax graduated according to the volume of business done. *Freeman v. Hewitt*, 329 U.S. 249 (1946). In like manner, this tax is measured by the volume of gas taken or retained. The amount of gas

taken or retained determines the degree of the privileges and benefits received, and the amount of the tax is fixed in the same proportion. The facts reflect that forty cents of each tax dollar is presently paid by local consumers, and that the consumers of thirty-eight other states pay the remaining sixty cents (R. 126). Do these facts logically support appellants' contention that the tax was "furtively directed" at interstate commerce? There is no attempt, "furtive" or otherwise, by the State of Texas to make interstate commerce bear the burdens of the State's local government. The conservation and proration laws result in benefits and protection for the intra and interstate "takers" alike. Under this statute they are taxed alike. This Court has stated that even interstate business must pay its way. *Western Live Stock v. Bureau of Revenue supra*, at 254. Appellants emphasized in their brief that every penny they paid in taxes, except insignificant amounts, came from out-of-state consumers. Appellees find no fault with this statement except that it is an attempt at deception. All the gas taken by the appellants, except insignificant amounts, was consumed by out-of-state consumers. The converse of their statement is equally true: Every penny collected from intrastate pipe lines comes from intrastate consumers.

Appellants contend that this tax is a regulation of interstate commerce because a member of the Texas House of Representatives declared that the act would tax gas that goes out of Texas and give as much protection as possible to Texas industries. But the validity of a tax statute does not depend upon what is said about it or the motive which impelled it. *Heisler v.*

Thomas Colliery Co., 260 U.S. 245, 258-259 (1922). In that case the taxpayer made the same contention based upon a declaration of the governor (presumably to the legislature) concerning the effect of the tax upon consumers in other states. The Court answered this contention as follows:

"We are unable to discern in the fact any materiality or pertinency, nor in the fact that Pennsylvania has a monopoly (if we may use the word) of the coal. Whether any statute or action of a State impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it. . . ."

(4) *This tax statute does not subject interstate commerce to a "multiple burden" because the local activity taxed does not take place in any state except Texas.*

To give rise to a multiple burden the *same*, not similar, activities must be subject to taxation by more than one state. *Gwin, White & Prince v Henneford*, 305 U.S. 434 (1939.) Other states may be able to tax local activities within their borders if they afford sufficient protection, benefits or opportunities to such local activities. But other states can not tax the local activity taxed by this statute because it is wholly performed in Texas. It is only where more than one state has a sufficient relationship to the *same* activity whereby each state could tax that activity that a "multiple burden" problem arises.

In *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U.S. 604 (1938), a case involving a state tax on the energy used in a compressor station on an interstate pipe line, the "multiple burden" argument was made. This Court, in rejecting the argument, declared that each state through which a pipe line passes could lay a tax on the use of engines for the production of power but that such tax by other states would not be multiple taxation, citing *Western Live Stock v. Bureau of Revenue*, *supra*. The Court further stated that such a tax by other states would not be a tax on the same activity either in form or in substance, but would be a different tax on a different and wholly separate subject matter with no cumulative effect by reason of the fact that interstate business was being done.

In the case at bar, no other state could validly levy a tax upon the first taking or retaining of the gas in question because it is inconceivable that any other state could afford special benefits, opportunities or protection to this activity which is wholly performed within Texas.

(5) *Appellants rely and base their whole case upon isolated quotations torn from their judicial settings.*

Appellants, by the use of isolated quotations, cited out of context and torn from the proper perspective of their individual judicial settings, have challenged the controlling authorities and established constitutional principles which uphold this tax statute. Since it would unduly lengthen this brief to discuss all

these quotations in the light of their judicial settings, we will consider only those cases chiefly relied upon by appellants.

**The quotation From *Nippert v. Richmond*,
327 U.S. 416 (1946).**

Appellants, on page 23 of their brief, set out a long quotation from *Nippert v. Richmond* in an attempt to show that a local activity can not be carved out for tax purposes from what is an entire or integral economic process. This case involved the constitutionality of a municipal ordinance imposing a tax upon the solicitation of business in the City of Richmond. The city contended that the act of solicitation was a local incident taking place wholly within the City of Richmond, and that the tax was valid since it was not levied upon the privilege of engaging in interstate commerce. The Court in the quoted portion of the opinion merely pointed out that not every local incident could be carved out of the process of interstate commerce, but only those which do not strike down or discriminate against interstate commerce. The Court discussed the long line of "drummer" cases and invalidated the Richmond tax on the ground that taxation of the right to solicit business in interstate commerce was inherently discriminatory as against interstate commerce. It stated that the small operator particularly, and more especially the casual and occasional one from out of the state, would find the tax not only burdensome but prohibitive, with the result that interstate commerce would be stopped before it was even

begun. Clearly this result discriminated against interstate commerce.

But in deciding the *Nippert* case the Court pointed out that there was no lack of power in the state or its municipalities to see that interstate commerce bears with local trade its fair share of the cost of local government, the benefit and protection of which it enjoys on a par with local business. As heretofore observed, this gas gathering tax calls upon interstate trade to bear only its fair share of the cost of local government as a recompense for the benefits and protection which it enjoys. And by its terms local business is taxed in the same amount and in the same manner.

This Court in the *Nippert* opinion at page 427 also pointed out that a solicitation tax inherently bore no relation to the volume of business done. Yet appellants in their brief actually complain of the present tax because it is directly proportioned to the volume of gas taken.

Quotations from *Puget Sound Stevedoring Co. v. Tax Comm.*, 302 U.S. 90 (1937), and *Joseph v. Carter and Weekes Stevedoring Co.*, 330 U.S. 422 (1947).

Appellants have picked out isolated quotations from these "stevedoring" cases in an attempt to show that the thing taxed was, in fact, the taxing of "taking possession" of goods for interstate commerce. Appellants further use these quotations to try to show that the loading of a ship by stevedores is analogous to the taking possession of gas at the outlet of processing plants for the purpose of load-

ing pipe lines. This Court invalidated the occupation tax upon the business of "stevedoring" in both the *Puget Sound* and *Carter & Weekes* cases on the ground that it was levied upon the privilege of engaging in interstate transportation. If this gas gathering tax were laid upon the local incident of taking possession of gas *and* the transportation of the gas, then these two "stevedoring" cases would be in point. However, this gas gathering tax is laid only upon the local incident of taking possession of gas for the purpose of further processing or transmission.

In the *Carter & Weekes* case, the prior holding of the Supreme Court in the *Pudget Sound* case was re-affirmed by a five to four divided court. In both of these "stevedoring" cases the incidence of the tax was upon the actual transportation itself, *i.e.*, the actual movement of goods in interstate commerce. The Court pointed out that the stevedores not only took possession of the goods but actually transported the goods between the dock and the hold of the ships, and that such transportation in reality constituted the first or last leg of an interstate journey.

The fact that the taxes in the "stevedoring" cases were upon the actual transportation itself, as contrasted with a tax upon the privilege of taking possession of gas for the purpose of other processing or transmission, makes the cases distinguished by this Court in the *Carter & Weeks* opinion the controlling authorities in the case now before this Court.

The quotation from *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1952).

Appellants, on page 43, quote out of context the following excerpt from the *Spector* opinion:

“... There is not only reason but long established precedent for keeping the Federal privilege of carrying on exclusively interstate commerce free from state taxation.”

Using the above quotation as a spring board, they arrive at the conclusion that “the court has consistently held that the state can not lawfully impose a tax for the privilege of carrying on an activity that is a part of commerce.” (Appellants’ Br. 44.)

Spector Motor Service was a Missouri corporation engaged exclusively in interstate trucking. The State of Connecticut levied a tax upon its franchise for the privilege of carrying on or doing business within such state. The Connecticut State court in passing upon its own tax act as applied to *Spector*, unequivocally held that the incidence of the tax was upon *Spector*’s franchise for the privilege of carrying on exclusively interstate transportation in the state. The Connecticut court also found: “There is no ground upon which the tax can be said to rest upon the use of highways by motor trucks.”⁷ The language and the rationale of the *Spector* opinion clearly reveal that if the Connecticut court had found that the tax was laid upon the privilege of “taking possession” of goods for transportation over

⁷ 135 Conn. 56-57.

the highways of Connecticut as a recompense to the state for furnishing "benefits" of using the state's highways, this Court would have upheld the tax.

The *Spector* case first reached this Court by way of certiorari (322 U.S. 720) but was then remanded to the Federal District Court with directions to retain the case pending the determination of proceedings to be brought in the state court to ascertain the incidence of the tax. 323 U.S. 104. Of course, this Court knew at that time that *Spector* was engaged exclusively in interstate commerce. This Court would not have been interested in having the Connecticut court find the incidence of the tax, if no tax whatsoever could be levied upon a local incident which is a part of interstate commerce. If no tax could be levied upon a local incident which is a part of interstate commerce, then this Court, in lieu of remanding the case to await such determination, would have invalidated the tax. But it was not until after the Connecticut court concluded that the Connecticut tax was placed unequivocally upon the corporation's franchise for the privilege of carrying on exclusively interstate transportation in the state, that this Court declared the tax to be invalid on the ground that it was a direct tax on the "privilege of carrying on or doing business in that State."

Insofar as the case now before this Court is concerned, the following statement at page 609 of the majority opinion becomes highly significant:

"... The State is not precluded from imposing taxes upon the other *activities or aspects of this busi-*

ness which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory." (Emphasis added.)

The Supreme Court stated that other *activities* or *aspects* of *this business*—Spector's business—could be taxed by the state, although Spector was engaged only in interstate commerce. The other activities or aspects of Spector's business that could be taxed were necessarily local or intrastate activities of that business, such as taking possession of goods for transportation over the highways of Connecticut. Yet these taxable local activities or aspects are also component parts of the interstate business of Spector.

Likewise, this gathering tax is laid upon a local activity or aspect of appellants' business—the first "taking or retaining" possession of gas for the purpose of other processing or transmission. We submit that this local activity or aspect of appellants' business, unlike the privilege of doing interstate business, is subject to the taxing power of the State of Texas.

(6) *The reasoning and rationale of the opinion of the Court as well as the dissenting opinion in the recent case of Memphis Steam Laundry v. Stone, 342 U.S. 389 (1952) clearly validates this gas gathering tax as not being an undue burden on interstate commerce.*

The most recent case decided by this Court dealing with the question of a state tax on local activities challenged on the basis that the commerce clause invalidated the state tax is *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952).

The State of Mississippi laid a tax upon the privilege of soliciting business for a laundry not licensed in that state. The Memphis Steam Laundry operated a laundry and cleaning establishment in Memphis, Tennessee. In serving the area surrounding Memphis, it sent ten of its trucks into Mississippi counties where its drivers picked up, delivered and collected for laundry and cleaning and solicited new customers. The tax statute in question levied a tax of \$50.00 per truck on vehicles used by persons soliciting business for a laundry not licensed in the State of Mississippi while it levied a tax of only \$8.00 per truck on vehicles used by persons soliciting business for laundries that were licensed in the State of Mississippi. The opinion, written by Mr. Chief Justice Vinson, with only one member of the Court dissenting, states:

"In passing upon the validity of a state tax challenged under the commerce clause, we first look to the 'operating incidence' of the tax. The Mississippi act requires a 'privilege license' and imposes a 'privilege tax' upon appellant's and employees 'soliciting business.' The Mississippi Supreme Court described the tax as follows: '... the tax involved here is not a tax on interstate commerce, but a tax on a person soliciting business for a laundry not licensed in this State, a local activity which applies to residents and non-residents alike.' The state may determine for itself the operating incidence of its tax. . . .

"It would appear from portions of the opinion of the court below that the tax is laid upon the privilege of soliciting interstate business on the theory that solicitation of customers for interstate commerce is a local activity subject to state taxation. However, the opinion below may also be read as construing the statutory term 'soliciting' more broadly, thereby resting the tax upon appellant's activities apart from soliciting new customers in Mississippi, mainly the pick-up and deliveries of laundry and cleaning on regular routes within the state. *Each construction of the statute raises different considerations . . .*" (342 U.S. 391-392.) (Emphasis added.)

This Court then stated, in effect, that it was not necessary to send the case back to the lower court for clarification as to the operating incidence of the tax since the tax would violate the commerce clause under either reading of the statute. The Court further stated that "whether or not solicitation of interstate business may be regarded as a local incidence of interstate commerce, the Court has not permitted state taxation to carve out this incidence from the integral economic process of interstate commerce." The court cited as authority *Nippert v. Richmond*, 327 U.S. 416. The Court in the *Nippert* case clearly stated that it had not permitted state taxation to carve out the local incidence of solicitation from the integral economic process of interstate commerce for the reason that the "drummer" taxes were inherently discriminatory against interstate commerce. In the foregoing quotation from the *Memphis* case, the Court clearly recognized that a local incidence other than solicitation, although a part of interstate com-

merce, may be carved out from the integral economic process of interstate commerce for the purpose of state taxation.

The Court stated that if the incidence of the tax was not upon the solicitation but was upon the picking up and delivering of the laundry, the "peddler" cases would apply, observing that the Court had previously sustained state taxation in the "peddler" cases on the ground that local sale and delivery of goods is an essentially intrastate process. Appellees can see no distinction between the "picking up" of laundry and the "taking possession" of gas.

Moreover, this Court struck the tax down in the *Memphis Steam Laundry* case not for the reason that the picking up, that is the taking, was not a proper local incidence that could be segregated for taxation purposes, but for the reason that the tax act in question was discriminatory as against interstate commerce, in that interstate commerce would have to pay \$50.00 per truck while intrastate was subjected to only \$8.00 per truck.

There is no possibility of discrimination in the application of the tax now before the Court. "Taking" possession of gas is no less a local aspect or incident of the interstate business of shipment of gas than is the "picking up" of laundry to an interstate cleaning and laundry business. The reasoning used by this Court and the rationale of the *Memphis Steam Laundry* opinion clearly demonstrates the validity of this gas gathering tax.

Appellants submit that the reasoning and holdings in the several cases discussed herein necessarily lead

to the conclusion that the local activity of "taking" or "retaining" possession of gas is a local taxable activity even if such taking and retaining is a part of interstate commerce.

II.

There are many decisions by the Supreme Court of the United States that would support a holding that interstate commerce does not begin until after the gas has been "taken" and has thereafter begun its final journey out of this state.

The point where intrastate commerce ends and interstate commerce begins is an area of "nice distinctions." In *Hood v. Dumond*, 336 U.S. 525, 568 (1949), Mr. Justice Frankfurter's dissent includes an interesting discussion of tax cases decided by the Supreme Court. He states that there has been an increasing recognition of the state's interest in seeing that interstate commerce "pays its way" and a consequent disposition to classify the object of the tax as intrastate.

There are many decisions by this Court that would support a holding that interstate commerce does not begin until after the gas has been "taken" and has thereafter begun its final journey out of the state.

We respectfully refer this Court to our discussion of *Chassanoil v. Greenwood*, *supra*, at page 29, and *Oliver Iron Mining Co. v. Lord*, *supra*, at page 27. See also *Coe v. Errol*, 116 U.S. 517 (1885); *Utah Power and Light Co. v. Pfof*, 286 U.S. 165 (1931); *Heisler v. Thomas Colliery Co.*, 260 U.S. 245

(1922) ; *Edelman v. Boeing Air Transport*, 289 U.S. 249 (1932).

Conclusion

In deciding this case, of course, this Honorable Court will consider the purpose of the Commerce Clause to protect interstate commerce from discriminatory or destructive state action. At the same time the Court will properly consider the function of state taxation and the necessity that state government have taxing power by which to require interstate commerce to bear its fair share of state tax burdens.

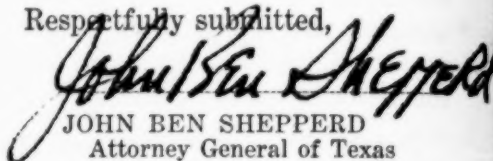
In the light of the uncontradicted benefits bestowed upon appellants and their consumers by the State of Texas, and the finding of the state court that the "all important operating incidence of the tax" is a local activity which does not discriminate against interstate commerce, we can conceive of no adequate ground for holding that the present tax is a regulation which the Commerce Clause forbids.

Appellees respectfully submit that the incidence of this tax is upon a local activity, separate and apart from the flow of commerce; that the tax is not levied upon the privilege of engaging in interstate commerce; that the tax is not discriminatory either on the face of the statute or in its practical operation; and that in return for the special benefits bestowed upon appellants and their consumers, they should be made to pay their own way, to the same extent as intrastate pipe lines and their consumers. Appellants have eagerly accepted and freely enjoyed the manifold advantages and benefits bestowed upon


them by the State of Texas. This Court should not give its sanction to their familiar claim, so often heard at taxpaying time, that interstate commerce is of such a "spiritual" nature that it cannot be made to pay its own way.

WHEREFORE, this appeal should either be dismissed or the judgments of the court below should be affirmed.

Respectfully submitted,


JOHN BEN SHEPPERD
Attorney General of Texas


W. V. GEPPERT
Assistant Attorney General


WILLIAM W. GUILD
Assistant Attorney General
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. 200

PANHANDLE EASTERN PIPELINE COMPANY,

Appellant,

vs.

**ROBERT S. CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS,
ET AL.**

**APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE SIXTH
SUPREME JUDICIAL DISTRICT OF TEXAS**

STATEMENT AS TO JURISDICTION

**D. H. CURSON,
EVERETT L. LOONEY,
E. DEAN MOOREHEAD,
EDWARD H. LAMAR,
GENE WOODSIN,**

Counsel for Appellant

**CURSON, MORGAN, BELLAIN & WELLS,
LOONEY, CLARK & MOOREHEAD,
WINTON, BLAKINS, WELLS &
STANLEY,
Of Counsel.**

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 200

PANHANDLE EASTERN PIPELINE COMPANY,
Appellant,

vs.

ROBERT S. CALVERT, ET AL.,
Appellees

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD
SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN, TEXAS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant, Panhandle Eastern Pipe Line Company (hereafter sometimes referred to as "Panhandle") submits its statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, in Cause No. 10,116 on its docket.

This appeal is a companion case to the appeal in *Michi-*

gan-Wisconsin Pipe Line Company v. Robert S. Calvert et al., which will be filed concurrently herewith. Both appeals are from similar judgments entered in the State Court in accordance with a single opinion hereinafter referred to. It is recognized in such opinion that the constitutional question involved in both cases is the same, and that the differences in factual situation between Michigan-Wisconsin and Panhandle are immaterial so far as that question is concerned.

Opinion Below

The trial judge filed no opinion. The opinion of the Court of Civil Appeals is reported at 255 S.W. 2d 535, and a copy is attached hereto as Appendix A.*

Question Presented

Whether a so-called occupation tax imposed by the State of Texas upon interstate natural gas pipeline companies for the privilege of receiving gas into their pipelines within the state for immediate transportation in interstate commerce and measured by the volumes of gas so received into such pipelines may stand consistently with the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States.

Statute Involved

H. B. 285, Chapter 402, page 740, Acts of the 52nd Legislature of Texas (1951), is an "omnibus" tax bill containing provisions relating to taxes of many kinds, only one section of which—Section XXIII of the Act¹—is here involved. A copy of Section XXIII is attached hereto as Appendix B,**

* (Clerk's note. This opinion is printed as an appendix to the Statement as to Jurisdiction in No. 198 and is not reprinted here.)

¹ Article 7057f, Vernon's Annotated Civil Statutes of Texas (V.A.C.S.).

** (Clerk's note. This statute is printed as an appendix to the Statement as to Jurisdiction in No. 198 and is not reprinted here.)

and the portions that are of special significance here, Subsection 2 and the second sentence of Subdivision (c) of Subsection 1, are here quoted.

Subsection 2 is as follows (Omitting certain exemptions therein contained that are not here pertinent):

“In addition to all other licenses and taxes levied and assessed in the State of Texas, there is hereby levied upon every person engaged in gathering gas produced in this State, an occupation tax for the privilege of engaging in such business, at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered.”

The second sentence of Subdivision (c) of Subsection 1 of such Section XXIII is as follows:

“In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term ‘gathering gas’ means the first taking or the first retaining of possession of such gas for other processing or transmission, whether through a pipeline, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant.”

Statement

The Court of Civil Appeals recognized in its opinion that, except for minor variations, Panhandle conducts its activities in the same manner as does Michigan-Wisconsin. Those variations, as stated by that Court, are that Panhandle “loads” its interstate pipeline with gas from the outlets of three gasoline plants rather than with gas from only one plant; that Panhandle produces a portion of the gas which it receives at the outlet of one of such plants; and that Panhandle makes sales in Texas to three small customers rather than sending all of its gas outside the state. 255 S.W. 2d at 539.

Panhandle is a natural gas pipeline company, holding certificates of convenience and necessity issued by the Federal Power Commission under the Natural Gas Act, 15 U.S.C., §717 *et seq.* Its main pipeline originates near the east boundary of Moore County, Texas, extends thence through portions of the states of Texas, Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio, and has its northern termini in the State of Michigan. It "takes or retains," within the meaning of Section XXIII of H.B. 285, gas into such pipeline at the outlets of three gasoline plants, namely, the Phillips Sneed gasoline plant, the Shamrock McKee gasoline plant and the Phillips Hansford gasoline plant. These points of taking are shown on Appendix A to the opinion of the Court of Civil Appeals. 255 S.W. 2d at 547.

The gas which Panhandle sells to three customers in Texas aggregates only 146.3 m.c.f. daily, representing only .36 of 1 per cent of the total volumes of gas received into its pipeline facilities within the State of Texas. Except for those sales, Panhandle sells no gas in Texas from such pipeline, its southernmost point of sale being Kismet, Kansas. The principal markets served by Panhandle include gas distribution companies and industrial consumers in the States of Missouri, Illinois, Indiana, Ohio and Michigan. In the operation of its interstate pipeline system, Panhandle owns and operates 18 compressor stations in various states.

In addition to interstate transportation of gas from Texas, Panhandle also produces gas in Texas. A portion of the gas so produced by Panhandle is delivered into the Sneed gasoline plant of Phillips Petroleum Company.² At

² Technically, it might be argued that, at the outlet of the gasoline plant, Panhandle "retains" possession of the residue from gas which it has produced and "takes" possession only of the residue gas which it purchases. However, this is an immaterial matter of verbiage, and, for convenience, all gas which Panhandle receives into its pipelines will be referred to as gas which Panhandle "takes."

that plant Phillips (under a contract between Panhandle and Phillips) extracts liquefiable hydrocarbons (gasoline, etc.) from the raw gas, and then, at the outlet of the gasoline plant, Panhandle receives or "takes" the residue gas into its interstate transportation pipeline along with other residue gas which is purchased by Panhandle from Phillips. At the outlets of the Shamrock McKee gasoline plant and the Phillips Hansford gasoline plant, Panhandle "loads its interstate pipeline" with residue gas produced by other producers.

The movement of all the residue gas which Panhandle takes at the outlets of such gasoline plants, from the outlets of the respective plants through Panhandle's pipeline system to its customers in other states, is a steady and continuous flow, and the taking of such gas at the outlets of the gasoline plants is accomplished by Panhandle through facilities owned by it that are used exclusively in connection with such taking, receiving and transportation. When the residue gas enters Panhandle's interstate pipeline at the outlets of the plants, such gas is already committed by contract to sale and delivery to Panhandle for transportation to points in other states (except the small portion thereof which is sold within the State of Texas).

There is no break in the continuous flow of the gas from the points where such gas enters Panhandle's interstate pipeline at the outlets of the gasoline plants to points of delivery to Panhandle's customers in states other than Texas; the purpose of taking the gas at the outlets of the gasoline plants is solely for interstate transportation to markets in states other than in Texas; and the invariable practice of Panhandle necessarily is to transport such gas in interstate commerce. It is perfectly obvious, therefore, that the function exercised by Panhandle as to the gas which it takes at the outlets of the three gasoline plants is the same function as that which is exercised by Michigan-

Wisconsin as to the gas which it takes at the outlet of the Phillips gasoline plant involved in Michigan-Wisconsin's case. The fact that Panhandle loads its interstate pipeline at three points, just as an interstate railroad loads its trains at more than one station, is, of course, not material. The fact that Panhandle engages in production of gas (a local activity) does not impair its right, under the Commerce Clause, to the protection of its interstate transportation activities against the burden of state occupation taxes. *Utah Power & Light Co. v. Pfof*, 286 U.S. 165 (1932); *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). Cf. *Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938). Nor is Panhandle deprived of the protection of the Commerce Clause as to the gas which it takes for interstate transportation by the circumstance that small quantities of gas are sold from its pipeline in the State of Texas. *United Fuel Gas Co. v. Hallanan*, 257 U.S. 277 (1921). The Court of Civil Appeals, therefore, properly recognized that the differences in factual situation between Michigan-Wisconsin and Panhandle are not material, and that the same principles which govern in Michigan-Wisconsin's case also apply to Panhandle insofar as the gas which it takes for immediate transportation to markets outside the state is concerned.

Section XXIII of H.B. 285, the statute here involved, levies a tax of 9/20 of one cent per thousand cubic feet upon every person engaged in taking possession of gas for transmission by pipeline, "for the privilege of engaging in such business" (Sec. 2). Reduced to its essentials therefore, the challenged statute levies a tax of 9/20 of a cent per m.c.f. upon Panhandle for the *privilege* of taking possession of natural gas at the inlet of its pipeline for direct, immediate and invariable transportation in interstate commerce.

The taxes levied by Section XXIII were paid by Pan-

handle under protest, pursuant to the provisions of the statutes of Texas,³ and a suit for their recovery was properly filed against the appropriate state officials in a state district court at Austin, Texas. That Court entered judgment for Panhandle for the full amount of the taxes paid plus interest as provided by the statute, holding Section XXIII to be violative of the Commerce Clause of the Constitution of the United States. Upon the State's appeal to the Court of Civil Appeals, that Court reversed the judgment of the district court, holding the statute valid under the Commerce Clause. Following denial of its motion for rehearing, Panhandle filed an application for writ of error in the Supreme Court of Texas, but that Court refused the application and denied motion for rehearing. By this appeal, appellant seeks review of the decision and judgment of the Court of Civil Appeals which sustained the validity of Section XXIII as applied to appellant's operations against appellant's claim of unconstitutionality under the Commerce Clause.

Jurisdiction

Appellant's application for writ of error was refused by the Supreme Court of Texas on May 6, 1953, and its motion for rehearing was denied on June 3, 1953. Because the Supreme Court of Texas refused to grant appellant's application for writ of error, the Court of Civil Appeals is the highest Court of the State in which a decision could be had. A petition for appeal was presented to the Chief Justice of that Court on June 25, 1953.

The jurisdiction of the Supreme Court to review by appeal the decision of the Court of Civil Appeals herein is conferred by Title 28 U.S.C., § 1257(2). The decisions sustaining this Court's jurisdiction on appeal include *United Gas Public Service v. Texas*, 301 U.S. 667 (1937); *Lone Star*

³ Article 7057b, Vernon's Annotated Civil Statutes.

Gas Co. v. Texas, 304 U.S. 224 (1938); *Bain Peanut Co. v. Pinson*, 282 U.S. 499 (1931); *Adams v. Saenger*, 303 U.S. 59, 61 (1938); *Bacon v. Texas*, 163 U.S. 207 (1896); *Sullivan v. Texas*, 207 U.S. 416 (1907); *San Antonio & Aransas Pass Ry. Co. v. Wagner*, 241 U.S. 476 (1916); *St. Louis, Etc., Ry. Co. v. Seale*, 229 U.S. 156 (1913); *American Railway Express Co. v. Levee*, 263 U.S. 19 (1923).

Manner in Which Federal Question Was Raised

Appellant challenged the validity of Section XXIII under the Commerce Clause of the Federal Constitution specifically and in detail at every stage of the proceedings in the state courts: In its protests (made concurrently with the monthly payments of the tax), its pleadings in the trial court, its brief and motion for rehearing in the Court of Civil Appeals, and in its application for writ of error and motion for rehearing in the Supreme Court of Texas. The Court of Civil Appeals itself stated in the opinion: "The single question presented for our decision is whether Article 7057f, a revenue statute, . . . as applied to the business activities of appellees, violates the Commerce Clause of the Constitution of the United States. If so it is void, if not it is valid."⁴ This Court will accept the recognition by the Court of Civil Appeals that the constitutional issue was properly raised in the State Courts. *Charleston Federal Savings & Loan Assn. v. Alderson*, 324 U.S. 182, 185 (1945).

The Question Presented By This Appeal Is Substantial

Of the many suits filed in the State Courts of Travis County, Texas, in which the validity of Section XXIII of H.B. 285 was challenged, three were selected as test cases,—the case filed by Michigan-Wisconsin, the case filed by Pan-

⁴ Appendix A, *infra*; 255 S.W. 2d at 537-8.

handle and one filed by Amarillo Oil Company (herein referred to as Amarillo). Amarillo does no interstate business. Its suit is based on Subsection 11 of the Act which provides, in substance, that if the Act is held invalid as to gas of which possession is taken for interstate transmission, the tax shall not be levied as to gas, possession of which is taken for intrastate consumption.

The three cases were tried together in the District Court and separate judgments were entered for refund of the taxes that had been paid under protest by each plaintiff, it being held that, as applied to the gas taken by Michigan-Wisconsin and Panhandle, respectively, for transportation in interstate commerce, the Act is violative of Article I, Sec. 8, Cl. 3 (the Commerce Clause) of the Constitution of the United States. Separate records were made and separate appeals were taken to the Court of Civil Appeals for the Third Supreme Judicial District of Texas. In that Court, the three cases were treated as companion cases. They were all briefed together, and orally argued together, and, while separate judgments of reversal were entered, the reversals were under one opinion which dealt with all three cases. Thereupon, separate but identical applications for writs of error were made to the Supreme Court of Texas where writ of error was refused in each such case. Thereafter, the Supreme Court of Texas overruled motions for rehearing of the applications filed by Michigan-Wisconsin and by Panhandle, but ruling on motion for rehearing of the application for writ of error filed by Amarillo was withheld by the Supreme Court.⁵

⁵ It is understood that action on the motion for rehearing filed by Amarillo has been withheld because it is recognized by the Court that Amarillo, doing wholly intrastate business, itself has no protection under the Commerce Clause and is entitled to relief only under Subsection 11 of the Act in the event the Act is held invalid as to those who take possession of gas for interstate transportation.

It was recognized by all parties in the preparation of briefs filed in the Court of Civil Appeals and in the briefs relating to the applications for writs of error that the minor variations between the operations of Michigan-Wisconsin and those of Panhandle are not of significance in a determination of the issue presented; and, since the facts relating to Michigan-Wisconsin are more simple than those pertaining to Panhandle (there being only one point of "taking" possession), the particular facts involved in Michigan-Wisconsin's case were used for purposes of illustration in considering whether the tax is imposed for the privilege of engaging in an activity that is a part of interstate commerce. That same policy was followed by the Court of Civil Appeals in its opinion which is applicable to both cases.

Appellant in the companion case, *Michigan-Wisconsin Pipe Line Company v. Robert S. Calvert et al.*, has incorporated in the "Statement as to Jurisdiction" presented in connection with its appeal, under the heading "The Question Presented by This Appeal Is Substantial," a full discussion of the importance of the appeal,—the substantiality of the question involved. In the interest of brevity, this appellant adopts, as if repeated here, that portion of the "Statement as to Jurisdiction" presented in connection with the appeal of Michigan-Wisconsin Pipe Line Company. Such discussion is here briefly summarized as follows:

The Act is "furtively directed" at interstate commerce. The legislature applied the term "gathering" in an artificial definition to an activity which is not "gathering" gas, as that term is generally understood, but is nothing more than "receiving possession" just as a railroad, a ship or a truck receives possession of other commodities for transportation. It was made clear, as shown by the legislative history, that the purpose of the Act was to "tax the pipe-

line gas that goes out of Texas and give as much protection as possible to Texas industries.”⁶ Subsection 4 of the Act makes it impossible for any pipeline to attempt by contract to shift the tax to its vendor. The tax must, at all events, be borne by the pipeline companies, and, eventually, the consumers. Moreover, it is expressly provided in Subsection 11 of the Act that if the tax levied thereby is held invalid, as applied to gas of which possession is taken for interstate transportation, the tax shall not be levied as to gas for intrastate consumption.

It is difficult to conceive a clearer case of a tax intended to rest directly upon interstate commerce or a bolder attempt to make interstate commerce (i.e., the people of other states) bear the burdens of a state's local government. Every gas pipeline company which operates lines leaving the state is subject to the tax simply because it “takes possession” of the product within the state for the purpose of such transportation. From the State of Texas, gas flows by pipelines to 38 other states. Consumers of gas carried by Panhandle alone reside in Missouri, Illinois, Indiana, Michigan, Ohio, Pennsylvania and Ontario, Canada. Gas transported by Michigan-Wisconsin serves consumers in Missouri, Iowa, Michigan and Wisconsin.⁷ The State of Texas thus has a tremendous leverage which it can exert through a tax upon a product dispersed so widely from a single source. Cf. *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U.S. 422, 433-434 (1947).

⁶ House Journal, June 1, 1951, p. 2979.

⁷ Many other pipeline companies (practically all of which are included among the 117 plaintiffs whose rights are dependent on the outcome of these test suits) also transport gas out of the numerous gas fields in Texas—the Panhandle area, the Gulf Coast area, the South Texas area, the Permian Basin—to points of consumption as far west as California, as far to the northwest as Minnesota, and northeasterly to the New England States.

As applied to appellants, the amount of the tax is measured by and related mathematically to the volumes of gas which are transported in interstate commerce, and interstate commerce is burdened in direct proportion to its volume. Moreover, if this tax is upheld, the way will be clear for the imposition of multiple tax burdens upon interstate commerce. If Texas may impose a tax upon pipelines for the "privilege" of "taking or retaining possession" of gas in Texas for transportation elsewhere, Oklahoma may levy a tax, measured by the entire volumes of gas transported, for the "privilege" of "taking or retaining possession" of the same gas within that state, or for any other activity within that state which contributes to the interstate movement of the gas—and so may the other states through which appellant's pipeline runs. This also is a proof of the invalidity of the Act. *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 435, 439 (1939).

The state has attempted to "carve out from what is an entire or integral economic process" a particular phase or incident, which it seeks to sustain on the theory that such a phase is "separate and distinct" or "local." That cannot lawfully be done. *Nippert v. Richmond*, 327 U.S. 416, 423 (1946); *Memphis Steam Laundry v. Stone*, 342 U.S. 389, 393 (1952). The "loading of a pipeline" for interstate transportation, like the loading of a ship or the loading of a train, is an inseparable, indivisible part of the transportation itself. *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937); *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U.S. 422 (1947); *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885).

The case shows the ultimate in continuity of interstate movement. The movement of the gas from the points where it is "loaded" into appellant's interstate pipeline to appellant's markets in the states named is a steady and

continuous flow. There is no storage involved, no break, no hesitation, but a continuous even movement into appellant's pipeline, and through its pipeline to points in other states. Under circumstances of similar continuity of movement and certainty of destination, this Court has "no doubt" that the movement of the gas was in interstate commerce. *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 687 (1947).

If Texas may lawfully tax carriers of gas for the "privilege" of "loading their pipelines" for immediate transportation to other states, then the State of Minnesota could lawfully tax the owners of ore boats for the privilege of loading their boats at Duluth for transportation to Gary; West Virginia could impose upon railroads a tax for the privilege of "taking possession" of coal for transportation to other states; Michigan would have an equal right to tax the carriers of motor vehicles for the privilege of "taking possession" of those vehicles for transportation throughout the country.

The tax here involved has exactly the same effect, as to gas, as if Texas had erected custom-houses at points on its state line where carriers, railroads, trucks, ships, or pipelines cross into other states, and was requiring such carriers to pay a tax on the commodities carried for the "privilege" of having "taken possession" of such goods (loaded their railroad cars, tanks, ships or pipelines) within the state. The Commerce Clause was designed to end, and in the future prevent, exactly this kind of impost laid upon commercial intercourse between the states. *Story, The Constitution, Sec.* 259, 260; *Case of the State Freight Tax*, 15 Wall. 273, 276; *Cf. Freeman v. Hewit*, 329 U.S. 249, 252; *Hood v. DuMond*, 336 U.S. 525, 533 (1949). Judged by that standard, Section XXIII of H.B. 285, the Texas "gathering tax" statute, cannot stand.

Conclusion

Appellant respectfully suggests that enough has been presented in this Statement of Jurisdiction and in the statement filed on behalf of Michigan-Wisconsin in the companion case to bring before this Court a question under the Commerce Clause that is far reaching and important both as to the principles involved and the impact upon the consumers of gas in the areas served by this appellant; that this Court's appellate jurisdiction has been properly invoked; and that the federal question involved is substantial in merit. The importance of the issue warrants this Court's consideration of the appeal upon full briefs and arguments.

Respectfully submitted,

D. H. CULTON
EVERETT L. LOONEY
R. DEAN MOORHEAD
EDWARD H. LANGE
GENE WOODFIN
Counsel for Appellant

CULTON, MORGAN, BRITAIN & WHITE,
LOONEY, CLARK & MOORHEAD,
VINSON, ELKINS, WEEMS & SEARLS,
Of Counsel

(9999)

FILED

JUL 23 1953

HAROLD B. WILLEY, Clerk

COPY
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 200

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

vs.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC
ACCOUNTS, ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD
SUPREME JUDICIAL DISTRICT OF TEXAS

STATEMENT OPPOSING JURISDICTION AND
MOTION TO DISMISS OR AFFIRM

✓ JOHN BEN SHEPPERD,
Attorney General of Texas,
W. V. GEPPERT,
Assistant Attorney General,
C. K. RICHARDS,
Assistant Attorney General,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 200

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

v.

ROBERT S. CALVERT, ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD
SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN, TEXAS

**STATEMENT OPPOSING JURISDICTION AND
MOTION TO DISMISS OR AFFIRM**

The Appellees, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, John Ben Shepperd, Attorney General of the State of Texas and Jesse James, State Treasurer of the State of Texas, believing that the matters set forth below will demonstrate the lack of substance in the question raised by this appeal, file this statement in opposition to appellant's statement as to jurisdiction.

Appellees include herein their motion to dismiss the appeal, or, in the alternative, to affirm the judgment of the Court of Civil Appeals for the Third Supreme Judicial Dis-

trict of Texas, on the ground that the federal question relied upon by appellant is unsubstantial in character, in that the question urged for reversal has been plainly foreclosed by prior decisions of the Supreme Court.

The Federal Question Is Unsubstantial

The United States Supreme Court has consistently recognized the following proposition of law which governs this appeal:

Although a person is engaged solely in interstate commerce, a State may validly levy a non-discriminatory tax upon a local incident or activity of the interstate business, which is separate and apart from the actual flow of commerce, provided the taxpayer is receiving from the State levying the tax, benefits, protection or opportunities which bear a fiscal relationship to the tax. *Memphis Gas Company v. Stone*, 335 U. S. 80 (1948); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940); *Freeman v. Hewit*, 329 U. S. 249 (1946); *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951).

The Supreme Court stated in an opinion by Mr. Justice Reed in the *Memphis Gas Company* case:

"We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. *This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business.*" 335 U.S. at p. 96.

The dissent by Mr. Justice Frankfurter, joined by Mr. Chief Justice Vinson, Mr. Justice Jackson and Mr. Justice

Burton, recognized that a State could validly levy a tax upon a local incident although a part of interstate commerce, when the taxing power exerted by the State bears fiscal relation to privileges, opportunities and benefits given by the State, but dissented on the ground that "The record is barren of any indication that 'the taxing power exerted by the State bears fiscal relation to protection, opportunities, and benefits given by the State,' *Wisconsin v. J. C. Penney*. . . . 335 U.S. at p. 100.

The tax in question is not levied upon the privilege of engaging in interstate commerce. The operating incidence of the tax as found by the State courts is: ". . . In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipe line, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant."

The opinion of the Texas courts further stated: "That the gathering of gas, so defined, is a local activity within the State of Texas and not subject to repetition elsewhere is apparent and since appellees do not allege the statute to be discriminatory, . . ." *Calvert v. Panhandle Eastern Pipe Line Company*, 255 S. W. 2d 535. Page 39 of Appellant's "Statement as to Jurisdiction," in Case No. 198, October Term, 1953.

Benefits, Protection and Opportunities Afforded by the State of Texas

The undisputed and unchallenged evidence adduced upon the trial of this cause takes from appellant the aegis of the "commerce clause."

(a) This evidence discloses that the very economic existence of appellant is dependent upon the privileges,

benefits and opportunities afforded by the State of Texas in the enforcement of its oil and gas conservation laws. Such evidence shows that the enforcement of such conservation laws has made it economically possible for appellant to be in business and makes it possible for it to remain in business for many years to come. From the evidence it is undisputed that if such oil and gas conservation laws were repealed, or there was no enforcement of such laws, those engaged in the transmission of gas would lose their investments; and the recently built pipe lines which have not been paid out could never be amortized. In addition, there would be a great deal of suffering on the part of the consumers of such gas in that their source of supply would last but a short period of time. (S.F. 84-86).

(b) The State of Texas exercises control and jurisdiction over the drilling, completing and production of oil and gas wells and over the plants that extract gasoline or other liquid hydrocarbons from gas; and neither the Congress of the United States, the Federal Power Commission nor any other Federal agency has by any law, rule or regulation exercised any control or jurisdiction over such activities. (Michigan-Wisconsin, S.F. 34-35).*

(c) One of the primary functions of the Railroad Commission of Texas in the enforcement of the Texas Oil and Gas Conservation statutes is to assure to the consumers of gas, in both interstate and intrastate commerce, an adequate supply of gas to supply their demands. (Michigan-Wisconsin, S.F. 46). One of the means by which this is accomplished is the practice of allowing the purchasers of gas to make "nominations." Mr. Murray, a petroleum engineer by profession and a member of the Railroad Commission testified in reference thereto as follows: "I consider the right to make nominations an extremely valuable privilege to the gas purchasers, so valuable that I don't

* All references are to Michigan-Wisconsin, S.F. as they are identical with Panhandle Eastern.

think they could operate without that privilege." He further stated in substance that the Texas Railroad Commission has the arduous task of administering the practice of nominations. (Michigan-Wisconsin, S.F. 151.) This testimony is uncontradicted and unchallenged.

(d) The Texas Legislature has enacted Article 6408-14, V.C.S., known as the "over and under six months balancing provision," for the special benefit of appellant and other pipe line companies. Mr. Murray testified in reference thereto as follows: ". . . the Legislature specifically for the benefit of the pipe lines passed an over and under six months balancing provision . . . affording these various pipe lines serving a single field the ability to get gas whenever their particular customers demand it and I do consider that a very valuable right and privilege to the gas companies." (Michigan-Wisconsin, S.F. pp. 78-79).

(e) The Texas gas conservation laws culminated in maximum benefits to appellant and other pipe line companies at the outlet of the gasoline plants (Michigan-Wisconsin, S.F. 85), at which point this appellant consummates its purchase of the gas.

(f) The Texas Legislature exempted from the tax gas taken or retained for the manufacture of carbon black. The manufacturers of carbon black do not receive the benefits from the conservation statutes. In fact, the conservation statutes are putting them out of business. (Mr. Murray's testimony; Michigan-Wisconsin, S.F. 142-148). So it is evident that the legislature in passing this taxing act, did so for the purpose of requiring those who receive the benefits of our gas conservation statutes to pay their way and exempted those who do not receive such benefits.

The Court of Civil Appeals in this case found from the above undisputed evidence as well as other evidence in the record that the tax levied by Article 7057f is "fairly commensurate with the protection and benefits conferred by

the State upon those engaged in the occupation described." 255 S.W. 2d at page 546; page 42 of Appellant's "Statement as to Jurisdiction," in Case No. 198, October Term, 1953.

There is no possibility of discrimination against interstate commerce under Article 7057f, either on the face of the statute or in its practical operation. The tax is placed upon the privilege of engaging in the business of taking or retaining possession of the gas for transmission, a local activity; and such tax is measured by the amount of gas taken or retained. The incidence and amount of the tax are in no way governed by a determination of whether the gas will be transmitted in intra or interstate commerce, or whether it is taken or retained for further processing. The stipulations show that approximately forty per cent of the revenue from this tax comes from those taking or retaining possession of gas for intrastate consumption. (Michigan-Wisconsin, S.F. 39.)

Likewise, there is no possibility of the same activity taxed by the State of Texas being validly taxed by other states, thus giving rise to a "multiple burden" on interstate commerce which again would have the effect of unduly burdening that commerce. *Gwin, White, Prince v. Henneford*, 305 U.S. 434 (1939).

The activity taxed by the State of Texas is conditioned upon the gas being produced in Texas, and is the "first taking or retaining" of possession within this State after processing within this State. Neither the production nor the "first taking or retaining" of possession has any relationship to any other State which would give rise to this same tax by another State.

Further, the tax must not be an undue burden on interstate commerce. Appellees admitted in open court upon trial of these cases that there was no undue burden, except that any tax placed directly upon interstate commerce is an undue burden.

The tax was not challenged upon the ground that there is no proper ratio between the amount of the tax and the protection, benefits and opportunities afforded by this State. The tax is a revenue tax, and has not been challenged as an attempt to place an embargo on interstate commerce. Finally, there has been and could be no contention that the State of Texas has no real interest in the subject matter here involved. Certainly the State of Texas has a vital interest in requiring each and every segment of her economy to share the burden of the cost of State government.

WHEREFORE, Appellees respectfully move the Court to dismiss this appeal, or, in the alternative, to affirm the decree of the Court of Civil Appeals heretofore entered herein.

Respectfully submitted,

JOHN BEN SHEPPERD,
Attorney General of Texas,
 W. V. GEPPERT,
Assistant Attorney General,
 C. K. RICHARDS,
Assistant Attorney General,
Attorneys for Appellees.

LAND AND WATER

CORRECTIONAL INSTITUTIONS

NO. 11

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

D. H. CURTIS

EDWARD J. LOONEY

H. D. MORGAN

EDWARD H. LEE

JOHN W. SMITH

Counsel for Appellants

CHURCH, MORGAN, BENTLEY & WHITE

LOONEY, CRANE & MORGAN

VINSON, BLANK, WHEAT & SEARS

Of Counsel

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 201

PANHANDLE EASTERN PIPE LINE COMPANY,

vs.

Appellant,

ROBERT S. CALVERT, ET AL.,

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant, Panhandle Eastern Pipe Line Company (hereafter sometimes referred to as "Panhandle") submits its statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the order and judgment of the Supreme Court of Texas in which that Court refused to issue a writ of error to the Court of Civil Appeals for the Third Supreme Judicial District of Texas for the purpose of reviewing the judgment of such Court of Civil Appeals in Cause No. 10,116 on its docket.

This appeal is a companion case to the appeal in *Michigan-Wisconsin Pipe Line Company v. Robert S. Calvert et al.*, which will be filed concurrently herewith. Both appeals

are from similar judgments entered in the State Court in accordance with a single opinion hereinafter referred to. It is recognized in such opinion that the constitutional question involved in both cases is the same, and that the differences in factual situation between Michigan-Wisconsin and Panhandle are immaterial so far as that question is concerned.

As is explained hereinafter under the heading "Jurisdiction," this appeal from the Supreme Court of Texas is taken as a precaution, in the alternative to an appeal which is being taken concurrently with this appeal from the Court of Civil Appeals for the Third Supreme Judicial District of Texas from the judgment entered by such Court of Civil Appeals in such Cause No. 10,116.

Opinion Below

Neither the trial judge nor the Supreme Court of Texas filed an opinion. The opinion of the Court of Civil Appeals is reported at 255 S.W. 2d 535, and a copy is attached hereto as Appendix A.* A copy of the order of the Supreme Court of Texas refusing writ of error is attached as Appendix C.

Question Presented

Whether a so-called occupation tax imposed by the State of Texas upon interstate natural gas pipeline companies for the privilege of receiving gas into their pipelines within the state for immediate transportation in interstate commerce and measured by the volumes of gas so received into such pipelines may stand consistently with the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States.

* (Clerk's note. This opinion is printed as an appendix to the Statement as to Jurisdiction in No. 198 and is not reprinted here.)

Statute Involved

H. B. 285, Chapter 402, page 740, Acts of the 52nd Legislature of Texas (1951), is an "omnibus" tax bill containing provisions relating to taxes of many kinds, only one section of which—Section XXIII of the Act¹—is here involved. A copy of Section XXIII is attached hereto as Appendix B,* and the portions that are of special significance here, Subsection 2 and the second sentence of Subdivision (c) of Subsection 1, are here quoted:

Subsection 2 is as follows: (Omitting certain exemptions therein contained that are not here pertinent)

"In addition to all other licenses and taxes levied and assessed in the State of Texas, there is hereby levied upon every person engaged in gathering gas produced in this State, an occupation tax for the privilege of engaging in such business, at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered."

The second sentence of Subdivision (c) of Subsection 1 of such Section XXIII is as follows:

"In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission, whether through a pipeline, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant."

¹ Article 7057f, Vernon's Annotated Civil Statutes of Texas (V.A.C.S.).

* (Clerk's note. This statute is printed as an appendix to the Statement as to Jurisdiction in No. 198 and is not reprinted here.)

Statement

The Court of Civil Appeals recognized in its opinion that, except for minor variations, Panhandle conducts its activities in the same manner as does Michigan-Wisconsin. Those variations, as stated by that Court, are that Panhandle "loads" its interstate pipeline with gas from the outlets of three gasoline plants rather than with gas from only one plant; that Panhandle produces a portion of the gas which it receives at the outlet of one of such plants; and that Panhandle makes sales in Texas to three small customers rather than sending all of its gas outside the state. 255 S.W. 2d at 539.

Panhandle is a natural gas pipeline company, holding certificates of convenience and necessity issued by the Federal Power Commission under the Natural Gas Act, 15 U.S.C., § 717 et seq. Its main pipeline originates near the east boundary of Moore County, Texas, extends thence through portions of the states of Texas, Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio, and has its northern termini in the State of Michigan. It "takes or retains," within the meaning of Section XXIII of H.B. 285, gas into such pipeline at the outlets of three gasoline plants, namely, the Phillips Sneed gasoline plant, the Shamrock McKee gasoline plant and the Phillips Hansford gasoline plant. These points of taking are shown on Appendix A to the opinion of the Court of Civil Appeals. 255 S.W. 2d at 547.

The gas which Panhandle sells to three customers in Texas aggregates only 146.3 m.c.f. daily, representing only .36 of 1 per cent of the total volumes of gas received into its pipeline facilities within the State of Texas. Except for those sales, Panhandle sells no gas in Texas from such pipeline, its southernmost point of sale being Kismet, Kansas. The principal markets served by Panhandle include gas distribution companies and industrial consumers in the

States of Missouri, Illinois, Indiana, Ohio and Michigan. In the operation of its interstate pipeline system, Panhandle owns and operates 18 compressor stations in various states.

In addition to interstate transportation of gas from Texas, Panhandle also produces gas in Texas. A portion of the gas so produced by Panhandle is delivered into the Sneed gasoline plant of Phillips Petroleum Company.² At that plant Phillips (under a contract between Panhandle and Phillips) extracts liquefiable hydrocarbons (gasoline, etc.) from the raw gas, and then, at the outlet of the gasoline plant, Panhandle receives or "takes" the residue gas into its interstate transportation pipeline along with other residue gas which is purchased by Panhandle from Phillips. At the outlets of the Shamrock McKee gasoline plant and the Phillips Hansford gasoline plant, Panhandle "loads its interstate pipeline" with residue gas produced by other producers.

The movement of all the residue gas which Panhandle takes at the outlets of such gasoline plants, from the outlets of the respective plants through Panhandle's pipeline system to its customers in other states, is a steady and continuous flow, and the taking of such gas at the outlets of the gasoline plants is accomplished by Panhandle through facilities owned by it that are used exclusively in connection with such taking, receiving and transportation. When the residue gas enters Panhandle's interstate pipeline at the outlets of the plants, such gas is already committed by contract to sale and delivery to Panhandle for transporta-

² Technically, it might be argued that, at the outlet of the gasoline plant, Panhandle "retains" possession of the residue from gas which it has produced and "takes" possession only of the residue gas which it purchases. However, this is an immaterial matter of verbiage, and, for convenience, all gas which Panhandle receives into its pipelines will be referred to as gas which Panhandle "takes."

tion to points in other states (except the small portion thereof which is sold within the State of Texas).

There is no break in the continuous flow of the gas from the points where such gas enters Panhandle's interstate pipeline at the outlets of the gasoline plants to points of delivery to Panhandle's customers in states other than Texas; the purpose of taking the gas at the outlets of the gasoline plants is solely for interstate transportation to markets in states other than in Texas; and the invariable practice of Panhandle necessarily is to transport such gas in interstate commerce. It is perfectly obvious, therefore, that the function exercised by Panhandle as to the gas which it takes at the outlets of the three gasoline plants is the same function as that which is exercised by Michigan-Wisconsin as to the gas which it takes at the outlet of the Phillips gasoline plant involved in Michigan-Wisconsin's case. The fact that Panhandle loads its interstate pipeline at three points, just as an interstate railroad loads its trains at more than one station, is, of course, not material. The fact that Panhandle engages in production of gas (a local activity) does not impair its right, under the Commerce Clause, to the protection of its interstate transportation activities against the burden of state occupation taxes. *Utah Power & Light Co. v. Pfof*, 286 U.S. 165 (1932); *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). Cf. *Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938). Nor is Panhandle deprived of the protection of the Commerce Clause as to the gas which it takes for interstate transportation by the circumstance that small quantities of gas are sold from its pipeline in the State of Texas. *United Fuel Gas Co. v. Hallanan*, 257 U.S. 277 (1921). The Court of Civil Appeals, therefore, properly recognized that the differences in factual situation between Michigan-Wisconsin and Panhandle are not material, and that the same principles which

govern in Michigan-Wisconsin's case also apply to Panhandle insofar as the gas which it takes for immediate transportation to markets outside the state is concerned.

Section XXIII of H.B. 285, the statute here involved, levies a tax of 9/20 of one cent per thousand cubic feet upon every person engaged in taking possession of gas for transmission by pipeline, "for the privilege of engaging in such business." (Sec. 2) Reduced to its essentials therefore, the challenged statute levies a tax of 9/20 of a cent per m.c.f. upon Panhandle for the *privilege* of taking possession of natural gas at the inlet of its pipeline for direct, immediate and invariable transportation in interstate commerce.

The taxes levied by Section XXIII were paid by Panhandle under protest, pursuant to the provisions of the statutes of Texas,³ and a suit for their recovery was properly filed against the appropriate state officials in a state district court at Austin, Texas. That Court entered judgment for Panhandle for the full amount of the taxes paid plus interest as provided by statute, holding Section XXIII to be violative of the Commerce Clause of the Constitution of the United States. Upon the State's appeal to the Court of Civil Appeals, that Court reversed the judgment of the district court, holding the statute valid under the Commerce Clause. Following denial of its motion for rehearing, Panhandle filed an application for writ of error in the Supreme Court of Texas, but that Court refused the application and denied motion for rehearing. By this appeal, appellant seeks review of the order and judgment of the Supreme Court of Texas in which that Court refused to issue a writ of error to the Court of Civil Appeals for the purpose of reviewing the judgment of such Court of Civil Appeals which sustained the validity of Section XXIII as applied to appellant's operations against appellant's claim of unconstitutionality under the Commerce Clause.

³ Article 7057b, Vernon's Annotated Civil Statutes.

Jurisdiction

Appellant's application for writ of error was refused by the Supreme Court of Texas on May 6, 1953, and its motion for rehearing was denied on June 3, 1953. A petition for appeal was presented to the Chief Justice of that Court on June 25, 1953.

The jurisdiction of this Court to review by appeal the decision of the highest court of a state is conferred by Title 28 U.S.C., Sec. 1257 (2). In early cases such as *Bacon v. Texas*, 163 U.S. 207 (1896), and *San Antonio & Aransas Pass Ry. Co. v. Wagner*, 241 U.S. 476 (1916), this Court held that, where the Texas Supreme Court denied a writ of error to review the judgment of a Court of Civil Appeals, the latter Court was "the highest court of a state in which a decision could be had," within the meaning of Title 28 U.S.C., Sec. 1257.

In 1927, there was added to Article 1728 of the Revised Civil Statutes of Texas an amendment which provided that, when the Texas Supreme Court believes that the judgment of a Court of Civil Appeals is a correct one and that the principles of law declared in the opinion of the latter Court are correctly determined, the Supreme Court will refuse an application for writ of error. This same provision has been carried over into Rule 483 of the Texas Rules of Civil Procedure.⁴ Hence, since 1927, the refusal of a writ by the Texas Supreme Court has constituted at least an implied expression with respect to the merits of the decision of the Court of Civil Appeals. This fact affords basis for an argument that decisions in cases such as the *Bacon* and *Wagner* cases, *supra*, are no longer controlling and that, under decisions such as those in *Hetrick v. Lindsey*, 265 U. S. 384 (1924) and *Matthews v. Huwe*, 269 U. S. 262 (1925), whenever the Texas Supreme Court refuses an

⁴ A copy of Rule 483 is attached hereto as Appendix D.

application for writ of error, that Court is the one from which an appeal or petition for certiorari to this Court should be prosecuted. Cf. *American Railway Express Co. v. Levee*, 263 U. S. 19 (1923).

This question was squarely raised in a motion to dismiss which was filed in connection with the appeal in *United Gas Public Service Co. v. Texas*, 301 U. S. 667 (1937). This Court denied the motion, citing, inter alia, *Norfolk & Suburban Turnpike Co. v. Virginia*, 225 U. S. 264 (1912). From such action, it might be inferred that this Court believes that the refusal of a writ by the Texas Supreme Court is not "an affirmance in express terms" within the holding of the *Norfolk* case, with the result that appeals and petitions for certiorari should continue to be prosecuted from the Court of Civil Appeals in cases where the Texas Supreme Court has refused writ of error. This inference is strengthened by the fact that in *Lone Star Gas Co. v. Texas*, 304 U. S. 224 (1938), this Court entertained an appeal from a Court of Civil Appeals in a situation in which the Texas Supreme Court had refused a writ. In both the *United* case and the *Lone Star* case, this Court directed its mandate to the Court of Civil Appeals, and this Court stated in such mandate that it had reviewed the judgment of the Court of Civil Appeals.

However, in *Sweatt v. Painter*, 339 U. S. 629 (1950), which was also a case in which the only action by the Texas Supreme Court was the refusal of a writ, this Court directed its writ of certiorari to the Texas Supreme Court rather than to the Court of Civil Appeals. In addition, this Court also directed its mandate to the Texas Supreme Court, and this Court stated in such mandate that the judgment which it had reviewed was the judgment in which the Texas Supreme Court refused the application for writ of error.

The *Sweatt* case is the latest Texas case to come before

this Court involving the refusal of a writ of error. In view of the fact that the writ of certiorari in that case was issued to the Texas Supreme Court, appellant feels that it cannot with safety rely upon the prior cases in which appeals and writs of certiorari have come from, or been directed to, the Courts of Civil Appeals. Hence, as a matter of precaution, appellant is filing this appeal from the Supreme Court of Texas in the alternative to the appeal which it is concurrently filing from the Court of Civil Appeals. Precedent for such action is found in *Western Union Telegraph Co. v. Priester*, 276 U. S. 252 (1928). See also Stern and Gressman, *Supreme Court Practice*, p. 165.

Except for formal matters and differences in the discussions of technical jurisdiction, this "Statement as to Jurisdiction" is identical with that which is filed with the appeal from the Court of Civil Appeals.

Manner in Which Federal Question Was Raised

Appellant challenged the validity of Section XXIII under the Commerce Clause of the Federal Constitution specifically and in detail at every stage of the proceedings in the state courts: In its protests (made concurrently with the monthly payments of the tax), its pleadings in the trial court, its brief and motion for rehearing in the Court of Civil Appeals, and in its application for writ of error and motion for rehearing in the Supreme Court of Texas. The Court of Civil Appeals itself stated in the opinion: "The single question presented for our decision is whether Article 7057f, a revenue statute, . . . as applied to the business activities of appellees, violates the Commerce Clause of the Constitution of the United States. If so it is void, if not it is valid."⁵ This Court will accept the recognition

⁵ Appendix A, *infra*; 255 S.W. 2d at 537-8.

by the Court of Civil Appeals that the constitutional issue was properly raised in the State Courts. *Charleston Federal Saving & Loan Assn. v. Alderson*, 324 U. S. 182, 185 (1945).

The Question Presented By This Appeal Is Substantial

Of the many suits filed in the State Courts of Travis County, Texas, in which the validity of Section XXIII of H. B. 285 was challenged, three were selected as test cases,—the case filed by Michigan-Wisconsin, the case filed by Panhandle and one filed by Amarillo Oil Company (herein referred to as Amarillo). Amarillo does no interstate business. Its suit is based on Subsection 11 of the Act which provides, in substance, that if the Act is held invalid as to gas of which possession is taken for interstate transmission, the tax shall not be levied as to gas, possession of which is taken for intrastate consumption.

The three cases were tried together in the District Court and separate judgments were entered for refund of the taxes that had been paid under protest by each plaintiff, it being held that, as applied to the gas taken by Michigan-Wisconsin and Panhandle, respectively, for transportation in interstate commerce, the Act is violative of Article I, Sec. 8, Cl. 3 (the Commerce Clause) of the Constitution of the United States. Separate records were made and separate appeals were taken to the Court of Civil Appeals for the Third Supreme Judicial District of Texas. In that Court, the three cases were treated as companion cases. They were all briefed together, and orally argued together, and, while separate judgments of reversal were entered, the reversals were under one opinion which dealt with all three cases. Thereupon, separate but identical applications for writs of error were made to the Supreme Court of Texas where writ of error was refused in each such case. There-

after, the Supreme Court of Texas overruled motions for rehearing of the applications filed by Michigan-Wisconsin and by Panhandle, but ruling on motion for rehearing of the application for writ of error filed by Amarillo was withheld by the Supreme Court.⁶

It was recognized by all parties in the preparation of briefs filed in the Court of Civil Appeals and in the briefs relating to the applications for writs of error that the minor variations between the operations of Michigan-Wisconsin and those of Panhandle are not of significance in a determination of the issue presented; and, since the facts relating to Michigan-Wisconsin are more simple than those pertaining to Panhandle (there being only one point of "taking" possession), the particular facts involved in Michigan-Wisconsin's case were used for purposes of illustration in considering whether the tax is imposed for the privilege of engaging in an activity that is a part of interstate commerce. That same policy was followed by the Court of Civil Appeals in its opinion which is applicable to both cases.

Appellant in the companion case, *Michigan-Wisconsin Pipe Line Company v. Robert S. Calvert, et al.*, has incorporated in the "Statement as to Jurisdiction" presented in connection with its appeal, under the heading "The Question Presented by This Appeal Is Substantial," a full discussion of the importance of the appeal,—the substantiality of the question involved. In the interest of brevity, this appellant adopts, as if repeated here, that portion of the "Statement as to Jurisdiction" presented in connection

⁶ It is understood that action on the motion for rehearing filed by Amarillo has been withheld because it is recognized by the Court that Amarillo, doing wholly intrastate business, itself has no protection under the Commerce Clause and is entitled to relief only under Subsection 11 of the Act in the event the Act is held invalid as to those who take possession of gas for interstate transportation.

with the appeal of Michigan-Wisconsin Pipe Line Company. Such discussion is here briefly summarized as follows:

The Act is "furtively directed" at interstate commerce. The legislature applied the term "gathering" in an artificial definition to an activity which is not "gathering" gas, as that term is generally understood, but is nothing more than "receiving possession" just as a railroad, a ship or a truck receives possession of other commodities for transportation. It was made clear, as shown by the legislative history, that the purpose of the Act was to "tax the pipeline gas that goes out of Texas and give as much protection as possible to Texas industries."⁷ Subsection 4 of the Act makes it impossible for any pipeline to attempt by contract to shift the tax to its vendor. The tax must, at all events, be borne by the pipeline companies, and; eventually, the consumers. Moreover, it is expressly provided in Subsection 11 of the Act that if the tax levied thereby is held invalid, as applied to gas of which possession is taken for interstate transportation, the tax shall not be levied as to gas taken for intrastate consumption.

It is difficult to conceive a clearer case of a tax intended to rest directly upon interstate commerce or a bolder attempt to make interstate commerce (i.e., the people of other states) bear the burdens of a state's local government. Every gas pipeline company which operates lines leaving the state is subject to the tax simply because it "takes possession" of the product within the state for the purpose of such transportation. From the State of Texas, gas flows by pipelines to 38 other states. Consumers of gas carried by Panhandle alone reside in Missouri, Illinois, Indiana, Michigan, Ohio, Pennsylvania and Ontario, Canada. Gas transported by Michigan-Wisconsin serves consumers in

⁷ House Journal, June 1, 1951, p. 2979.

Missouri, Iowa, Michigan and Wisconsin.⁸ The State of Texas thus has a tremendous leverage which it can exert through a tax upon a product dispersed so widely from a single source. Cf. *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 433-434 (1947).

As applied to appellants, the amount of the tax is measured by and related mathematically to the volumes of gas which are transported in interstate commerce, and interstate commerce is burdened in direct proportion to its volume. Moreover, if this tax is upheld, the way will be clear for the imposition of multiple tax burdens upon interstate commerce. If Texas may impose a tax upon pipelines for the "privilege" of "taking or retaining possession" of gas in Texas for transportation elsewhere, Oklahoma may levy a tax, measured by the entire volumes of gas transported, for the "privilege" of "taking or retaining possession" of the same gas within that state, or for any other activity within that state which contributes to the interstate movement of the gas—and so may the other states through which appellant's pipeline runs. This also is a proof of the invalidity of the Act. *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 435, 439 (1939).

The state has attempted to "carve out from what is an entire or integral economic process" a particular phase or incident, which it seeks to sustain on the theory that such a phase is "separate and distinct" or "local." That cannot lawfully be done. *Nippert v. Richmond*, 327 U. S. 416, 423 (1946); *Memphis Steam Laundry v. Stone*, 342 U. S. 389, 393 (1952). The "loading of a pipeline" for interstate trans-

⁸ Many other pipeline companies (practically all of which are included among the 117 plaintiffs whose rights are dependent on the outcome of these test suits) also transport gas out of the numerous gas fields in Texas—the Panhandle area, the Gulf Coast area, the South Texas area, the Permian Basin—to points of consumption as far west as California, as far to the northwest as Minnesota, and northeasterly to the New England States.

portation, like the loading of a ship or the loading of a train, is an inseparable, indivisible part of the transportation itself. *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90 (1937); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, (1885).

This case shows the ultimate in continuity of interstate movement. The movement of the gas from the points where it is "loaded" into appellant's interstate pipeline to appellant's markets in the states named is a steady and continuous flow. There is no storage involved, no break, no hesitation, but a continuous even movement into appellant's pipeline, and through its pipeline to points in other states. Under circumstances of similar continuity of movement and certainty of destination, this Court had "no doubt" that the movement of the gas was in interstate commerce. *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682, 687 (1947).

If Texas may lawfully tax carriers of gas for the "privilege" of "loading their pipelines" for immediate transportation to other states, then the State of Minnesota could lawfully tax the owners of ore boats for the privilege of loading their boats at Duluth for transportation to Gary; West Virginia could impose upon railroads a tax for the privilege of "taking possession" of coal for transportation to other states; Michigan would have an equal right to tax the carriers of motor vehicles for the privilege of "taking possession" of those vehicles for transportation throughout the country.

The tax here involved has exactly the same effect, as to gas, as if Texas had erected custom-houses at points on its state line where carriers, railroads, trucks, ships or pipelines cross into other states, and was requiring such carriers to pay a tax on the commodities carried for the "privilege"

of having "taken possession" of such goods (loaded their railroad cars, tanks, ships or pipelines) within the state. The Commerce Clause was designed to end, and in the future prevent, exactly this kind of impost laid upon commercial intercourse between the states. Story, *The Constitution*, Sec. 259, 260; *Case of the State Freight Tax*, 15 Wall. 232, 276; Cf. *Freeman v. Hewit*, 329 U. S. 249, 252; *Hood v. DuMond*, 336 U. S. 525, 533 (1949). Judged by that standard, Section XXIII of H. B. 285, the Texas "gathering tax" statute, cannot stand.

Conclusion

Appellant respectfully suggests that enough has been presented in this Statement of Jurisdiction and in the statement filed on behalf of Michigan-Wisconsin in the companion case to bring before this Court a question under the Commerce Clause that is far reaching and important both as to the principles involved and the impact upon the consumers of gas in the areas served by this appellant; that this Court's appellate jurisdiction has been properly invoked; and that the federal question involved is substantial in merit. The importance of the issue warrants this Court's consideration of the appeal upon full briefs and arguments.

Respectfully submitted,

D. H. CULTON,
EVERETT L. LOONEY,
R. DEAN MOORHEAD,
EDWARD H. LANGE,
GENE WOODFIN,
Counsel for Appellant.

CULTON, MORGAN, BRITAIN & WHITE,
LOONEY, CLARK & MOORHEAD,
VINSON, ELKINS, WEEMS & SEARLS,
Of Counsel.

APPENDIX "C"

IN THE SUPREME COURT OF TEXAS

May 6, 1953

From Travis County, Third District

No. A-4088

PANHANDLE EASTERN PIPE LINE CO.,

vs.

ROBERT S. CALVERT et al.

This day came on to be heard the application of petitioner for a writ of error to the Court of Civil Appeals for the Third District and the same having been duly considered, it is ordered that the application be refused; that the applicant, Panhandle Eastern Pipe Line Co., pay all costs incurred on this application.

June 3, 1953

(No. A-4088)

The motion for rehearing herein having heretofore been submitted to the Court and after due consideration of same, it is ordered that the said motion be, and is hereby, overruled.

APPENDIX "D"

Rule 483, Texas Rules of Civil Procedure Rule 483. Order on Application for Writ of Error

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused." In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the

law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation "Refused. No reversible Error." In all cases where the Supreme Court is without jurisdiction of the case as presented in the application it will dismiss the application with the docket notation, "Dismissed for want of jurisdiction."

Provided, that in cases of conflict named in Subdivision 2 of Art. 1728 of the Revised Civil Statutes of Texas, 1925, the Supreme Court may, in its discretion, refuse the writ of error where the court is in agreement with the decision of the Court of Civil Appeals in the case in which the application is filed; and in cases of such conflict with a previous opinion of the Supreme Court, the Supreme Court may, in its discretion, without the necessity of granting the writ and hearing the case, reverse and remand the same on the application for writ of error. *As amended by order of Oct. 10, 1945, effective Feb. 1, 1946.*

(17)

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Office - Supreme Court, U.S.

FILED

JUL 23 1953

HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 201

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

vs.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC
ACCOUNTS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

STATEMENT OPPOSING JURISDICTION AND
MOTION TO DISMISS OR AFFIRM

✓ JOHN BEN SHEPPERD,
Attorney General of Texas;
W. V. GEPPERT,
w/ Assistant Attorney General;
C. K. RICHARDS,
Assistant Attorney General,
Counsel for Appellees.

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STATUTES AND OTHER AUTHORITIES CITED

Vernon's Annotated Civil Statutes of Texas:

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 201

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

vs.

ROBERT S. CALVERT, ET AL.

APPEAL FROM THE SUPREME COURT OF TEXAS, AT AUSTIN, TEXAS

**STATEMENT OPPOSING JURISDICTION AND
MOTION TO DISMISS OR AFFIRM**

The Appellees, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, John Ben Shepperd, Attorney General of the State of Texas and Jesse James, State Treasurer of the State of Texas, believing that the matters set forth below will demonstrate the lack of substance in the question raised by this appeal, file this statement in opposition to appellant's statement as to jurisdiction.

Appellees include herein their motion to dismiss the appeal, or, in the alternative, to affirm the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, on the ground that the federal question

relied upon by appellant is unsubstantial in character, in that the question urged for reversal has been plainly foreclosed by prior decisions of the Supreme Court.

The Federal Question Is Unsubstantial

The United States Supreme Court has consistently recognized the following proposition of law which governs this appeal:

Although a person is engaged solely in interstate commerce, a State may validly levy a non-discriminatory tax upon a local incident or activity of the interstate business, which is separate and apart from the actual flow of commerce, provided the taxpayer is receiving from the State levying the tax, benefits, protection or opportunities which bear a fiscal relationship to the tax. *Memphis Gas Company v. Stone*, 335 U. S. 80 (1948); *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435 (1940); *Freeman v. Hewit*, 329 U. S. 249 (1946); *Spector Motor Service v. O'Connor*, 340 U. S. 602 (1951).

The Supreme Court stated in an opinion by Mr. Justice Reed in the *Memphis Gas Company* case:

"We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. *This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business.*" 335 U. S. at p. 96.

The dissent by Mr. Justice Frankfurter, joined by Mr. Chief Justice Vinson, Mr. Justice Jackson and Mr. Justice Burton, recognized that a State could validly levy a tax

upon a local incident although a part of interstate commerce, when the taxing power exerted by the State bears fiscal relation to privileges, opportunities and benefits given by the State, but dissented on the ground that "The record is barren of any indication that 'the taxing power exerted by the State bears fiscal relation to protection, opportunities, and benefits given by the State,' *Wisconsin v. J. C. Penney* . . .", 335 U. S. at p. 100.

The tax in question is not levied upon the privilege of engaging in interstate commerce. The operating incidence of the tax as found by the State courts is: ". . . In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipe line, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant."

The opinion of the Texas courts further stated: "That the gathering of gas, so defined, is a local activity within the State of Texas and not subject to repetition elsewhere is apparent and since appellees do not allege the statute to be discriminatory, . . ." *Calvert v. Panhandle Eastern Pipe Line Company*, 255 S. W. 2d 535. Page 39 of Appellant's "Statement as to Jurisdiction," in Case No. 198, October Term, 1953.

Benefits, Protection and Opportunities Afforded by the State of Texas

The undisputed and unchallenged evidence adduced upon the trial of this cause takes from appellant the aegis of the "commerce clause."

(a) This evidence discloses that the very economic existence of appellant is dependent upon the privileges,

benefits and opportunities afforded by the State of Texas in the enforcement of its oil and gas conservation laws. Such evidence shows that the enforcement of such conservation laws has made it economically possible for appellant to be in business and makes it possible for it to remain in business for many years to come. From the evidence it is undisputed that if such oil and gas conservation laws were repealed, or there was no enforcement of such laws, those engaged in the transmission of gas would lose their investments; and the recently built pipe lines which have not been paid out could never be amortized. In addition, there would be a great deal of suffering on the part of the consumers of such gas in that their source of supply would last but a short period of time. (S. F. 84-86).

(b) The State of Texas exercises control and jurisdiction over the drilling, completing and production of oil and gas wells and over the plants that extract gasoline or other liquid hydrocarbons from gas; and neither the Congress of the United States, the Federal Power Commission nor any other Federal agency has by any law, rule or regulation exercised any control or jurisdiction over such activities. (Michigan-Wisconsin, S. F. 34-35).*

(c) One of the primary functions of the Railroad Commission of Texas in the enforcement of the Texas Oil and Gas Conservation statutes is to assure to the consumers of gas, in both interstate and intrastate commerce, an adequate supply of gas to supply their demands. (Michigan-Wisconsin, S. F. 46). One of the means by which this is accomplished is the practice of allowing the purchasers of gas to make "nominations." Mr. Murray, a petroleum engineer by profession and a member of the Railroad Commission testified in reference thereto as follows: "I consider the right to make nominations an extremely valuable privilege to the gas purchasers, so valuable that I don't think they

* All references are to Michigan-Wisconsin, S. F. as they are identical with Panhandle Eastern.

could operate without that privilege." He further stated in substance that the Texas Railroad Commission has the arduous task of administering the practice of nominations. (Michigan-Wisconsin, S.F. 151). This testimony is uncontradicted and unchallenged.

(d) The Texas Legislature has enacted Article 6408-14, V.C.S., known as the "over and under six months balancing provision", for the special benefit of appellant and other pipe line companies. Mr. Murray testified in reference thereto as follows: ". . . the Legislature specifically for the benefit of the pipe lines passed an over and under six months balancing provision. . . affording these various pipe lines serving a single field the ability to get gas whenever their particular customers demand it and I do consider that a very valuable right and privilege to the gas companies." (Michigan-Wisconsin, S.F. pp. 78-79).

(e) The Texas gas conservation laws culminated in maximum benefits to appellant and other pipe line companies at the outlet of the gasoline plants, (Michigan-Wisconsin, S.F. 85) at which point this appellant consummates its purchase of the gas.

(f) The Texas Legislature exempted from the tax gas taken or retained for the manufacture of carbon black. The manufacturers of carbon black do not receive the benefits from the conservation statutes. In fact, the conservation statutes are putting them out of business. (Mr. Murray's testimony; Michigan-Wisconsin, S.F. 142-148). So it is evident that the legislature in passing this taxing act, did so for the purpose of requiring those who received the benefits of our gas conservation statutes to pay their way and exempted those who do not receive such benefits.

The Court of Civil Appeals in this case found from the above undisputed evidence as well as other evidence in the record that the tax levied by Article 7057f is "fairly commensurate with the protection and benefits conferred by the State upon those engaged in the occupation described."

255 S.W. 2d at page 546; page 42 of Appellant's "Statement as to Jurisdiction," in Case No. 198, October Term, 1953.

There is no possibility of discrimination against interstate commerce under Article 7057f, either on the face of the statute or in its practical operation. The tax is placed upon the privilege of engaging in the business of taking or retaining possession of the gas for transmission, a local activity; and such tax is measured by the amount of gas taken or retained. The incidence and amount of the tax are in no way governed by a determination of whether the gas will be transmitted in intra or interstate commerce, or whether it is taken or retained for further processing. The stipulations show that approximately forty per cent of the revenue from this tax comes from those taking or retaining possession of gas for intrastate consumption. (Michigan-Wisconsin, S.F. 39).

Likewise, there is no possibility of the same activity taxed by the State of Texas being validly taxed by other states, thus giving rise to a "multiple burden" on interstate commerce which again would have the effect of unduly burdening that commerce. *Gwin, White, Prince v. Henneford*, 305 U.S. 434 (1939).

The activity taxed by the State of Texas is conditioned upon the gas being produced in Texas, and is the "first taking or retaining" of possession within this State after processing within this State. Neither the production nor the "first taking or retaining" of possession has any relationship to any other State which would give rise to this same tax by another State.

Further, the tax must not be an undue burden on interstate commerce. Appellees admitted in open court upon trial of these cases that there was no undue burden, except to the extent that any tax placed directly upon interstate commerce is an undue burden.

The tax was not challenged upon the ground that there is no proper ratio between the amount of the tax and the protection, benefits and opportunities afforded by this State. The tax is a revenue tax, and has not been challenged as an attempt to place an embargo on interstate commerce. Finally, there has been and could be no contention that the State of Texas has no real interest in the subject matter here involved. Certainly the State of Texas has a vital interest in requiring each and every segment of her economy to share the burden of the cost of State government.

WHEREFORE, Appellees respectfully move the Court to dismiss this appeal, or, in the alternative, to affirm the decree of the Supreme Court of Texas heretofore entered herein.

Respectfully submitted,

JOHN BEN SHEPPERD,
Attorney General of Texas,
 W. V. GEPPERT,
Assistant Attorney General,
 C. K. RICHARDS,
Assistant Attorney General,
Attorneys for Appellees.

FILED

OCT 27 1953

HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1953

Nos. 198-9, 200-1

MICHIGAN-WISCONSIN PIPE LINE CO.,
ET AL.,

Appellants,

v.

ROBERT S. CALVERT, ET AL.,
Appellees.

MOTION TO ADVANCE

JOHN BEN SHEPPERD
Attorney General of Texas

W. V. GEPPERT
Assistant Attorney General

WILLIAM W. GUILD
Assistant Attorney General

Attorneys for Appellees

IN THE
Supreme Court of the United States
OCTOBER TERM, 1953

Nos. 198-9, 200-1

MICHIGAN-WISCONSIN PIPE LINE CO.,
ET AL.,

Appellants,

v.

ROBERT S. CALVERT, ET AL.,
Appellees.

MOTION TO ADVANCE

TO THE HONORABLE SUPREME COURT OF THE UNITED
STATES:

Now come the Appellees in the above numbered and entitled cause and respectfully move this Honorable Court to advance the hearing and oral argument in the above cases, and for grounds therefor will show the following:

Statement of the Nature of the Cases

The Appellees are Robert S. Calvert, Comptroller of Public Accounts, John Ben Shepperd, Attorney General, and Jesse James, State Treasurer, all of whom are Texas officials. The Appellants are both engaged in the transmission of gas produced in

Texas. Part of the gas involved is transmitted in intrastate commerce and part in interstate commerce. Both Appellants either take and/or retain such gas at the outlet of gasoline plants within the meaning of Section XXIII of House Bill 285, Acts of the Fifty-second Legislature of Texas (1951) which is a revenue measure. Subsection 2 of the Act is as follows: (omitting certain exemptions)

“In addition to all other licenses and taxes levied and assessed in the State of Texas, there is hereby levied upon every person engaged in gathering gas produced in this State, an occupation tax for the privilege of engaging in such business, at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered.”

The second sentence of Subdivision (c) of Subsection 1 of such Section XXIII is as follows:

“In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term ‘gathering gas’ means the first taking or the first retaining of possession of such gas for other processing or transmission, whether through a pipeline, either common carrier or private, or otherwise, after such gas has passed through the outlet of such plant.”

The single question presented for decision is whether the revenue measure, as applied to the business activities of Appellants violates the Commerce Clause of the Constitution of the United States.

Reasons Supporting Motion

There exists within the State of Texas an urgent need for the early disposition of this litigation in order to evaluate properly the financial structure of the State. An immediate need exists for money to finance a program of drouth relief, an increase in teachers' salaries, public employees' salaries, and the financing of the Texas eleemosynary institutions. In view of the recent reduction in the Texas oil allowances, the revenue of Texas has been greatly curtailed and an early decision in these cases would be extremely advantageous in determining the financial needs to be supplied by a Called Session of the Texas Legislature.

Moreover, there are approximately one hundred twenty-five (125) similar separate suits pending in the Texas Trial Courts awaiting the outcome of these two cases. Under our protest statute it is necessary to amend the petitions every ninety (90) days to include additional payments made under protest. The amended petitions consist of twenty (20) to forty (40) typewritten pages, exclusive of exhibits, which create an extreme hardship upon these other litigants.

Prayer

WHEREFORE, Appellees respectfully pray this Honorable Court to advance these causes for hearing

and oral argument to an earlier session, if such advancement will meet the convenience of this Court.

Respectfully submitted,

JOHN BEN SHEPPERD
Attorney General of Texas

W. V. GEPPERT
Assistant Attorney General

WILLIAM W. GUILD
Assistant Attorney General
Attorneys for Appellees

Copies of this Motion have been furnished to adverse counsel.

FEB 20 1954

HAROLD B. WILLEY, C

IN THE
Supreme Court of the United States
OCTOBER TERM, 1953

No. 198

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
Appellant,

v.

ROBERT S. CALVERT, COMPTROLLER
OF PUBLIC ACCOUNTS, ET AL.,
Appellees.

No. 200

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

v.

ROBERT S. CALVERT, COMPTROLLER
OF PUBLIC ACCOUNTS, ET AL.,
Appellees.

MOTION FOR REHEARING

JOHN BEN SHEPPERD
Attorney General of Texas

W. V. GEPPERT
Assistant Attorney General

WILLIAM W. GUILD
Assistant Attorney General

Counsels for Petitioners.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1953

No. 198

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
Appellant,
v.

ROBERT S. CALVERT, COMPTROLLER
OF PUBLIC ACCOUNTS, ET AL.,
Appellees.

No. 200

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,
v.

ROBERT S. CALVERT, COMPTROLLER
OF PUBLIC ACCOUNTS, ET AL.,
Appellees.

MOTION FOR REHEARING

Robert S. Calvert, Comptroller of Public Accounts, Jesse James, Treasurer, and John Ben Shepperd, Attorney General, officials representing the State of Texas, the above named appellees, present this petition for rehearing, and, in support thereof, respectfully represent:

The opinion sets out the issue before the Court as follows:

“... the sole question is whether such local activities are so closely related to and such an integral part of the interstate business of [appellants] who transport gas in interstate commerce as to be within the scope of the Commerce Clause of the Constitution.”

The issues of discrimination and multiple burden do not exist in this case, as was admitted by counsels for appellants in their oral argument. Further, under the stringent pleading practices of the consent statute and the appellate history of this case, these issues *are not before this Court*.

The incidence of the tax is the “taking” of the gas, but the statute qualifies this incidence to mean *first* taking of gas *produced in Texas*. The State does not tax mere taking analogous to an *unqualified* taking of goods by commercial transporters. The State does not *avoid* a tax upon the sale of gas or avoid the “substantial economic factor” such as “the interference of title passing.” The *qualified* term “taking” in the gas gathering tax is *in lieu* of the “sale-purchase” transaction.

In the case at bar, as is true of the entire gas industry operating in Texas, every “taking”, *subject to the tax*, was and is and must be accompanied by a sale to and purchase by the pipelines of the gas taken.

The court in its opinion recognizes that an “interference of title passing” is a sufficient factor to

segregate the local activity from the flow of commerce. A sale and purchase of gas has this factor, and the taking taxed is a constituent element of a sale and purchase transaction. If the whole transaction is recognized by this honorable court to be a "local activity", each lesser constituent part of the transaction must also be a "local activity."

Conclusion

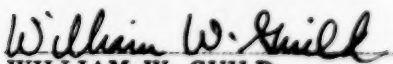
The first taking of gas produced in Texas, taxed under Texas Laws, 1951, c. 402, Sec. XXIII, in all instances reflects a sales and purchase of the gas. That the Legislature could have used more palatable terms should not discredit the taxing incidence; and petitioners for rehearing represent that the activity is of such a local nature as to be amenable to a State tax, while so peculiar to the operation in Texas as not to occur in any other State.

Rehearing should be granted to give effect to these facts.

Respectfully submitted,

JOHN BEN SHEPPERD
Attorney General of Texas

W. V. GEPPERT
Assistant Attorney General


WILLIAM W. GUILD
Assistant Attorney General
Counselors for Petitioners.

Certificate of Counsel

I, *William W. Guild*, counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

William W. Guild

Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

Nos. 198, 199, 200 AND 201.—OCTOBER TERM, 1953.

Michigan-Wisconsin Pipe Line Co., Appellant, 198 v. Robert S. Calvert, et al.	}	On Appeals From the Court of Civil Appeals of Texas, Third Supreme Ju- dicial District.
Panhandle Eastern Pipe Line Co., Appellant, 200 v. Robert S. Calvert, et al.		
Michigan-Wisconsin Pipe Line Co., Appellant, 199 v. Robert S. Calvert, et al.	}	On Appeals From the Supreme Court of Texas.
Panhandle Eastern Pipe Line Co., Appellant, 201 v. Robert S. Calvert, et al.		

[February 8, 1954.]

MR. JUSTICE CLARK delivered the opinion of the Court.

The appellants, two natural gas pipeline companies, brought separate suits against Texas State officials, appellees here, in a state district court, seeking a determination that a Texas tax statute as applied to appellants violates the Commerce Clause of the Constitution of the United States, and seeking recovery of money paid under protest in compliance with the statute. The District Court sustained appellants' contentions and entered judgment in their favor. The Court of Civil Appeals reversed, holding that the tax statute as applied is con-

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stitutional. The Supreme Court of Texas "refused" appellants' applications for writs of error.

By state statute and procedural rule, the docket notation "refused" in denying application for writ of error signifies that the State Supreme Court deems the judgment of the Court of Civil Appeals a correct one and the principles of law declared in the opinion correctly determined. Appellants were uncertain whether appeal to this Court was properly from the Court of Civil Appeals or the Supreme Court of Texas, as "the highest court of a State in which a decision could be had" within the meaning of 28 U. S. C. § 1257. Hence each appellant appealed from each of the courts.¹ We postponed to the hearing of the cases on the merits a determination of the jurisdictional question. 346 U. S. 805.

We think that appeals in these cases were properly from the Court of Civil Appeals. In *American Railway Express Co. v. Levee*, 263 U. S. 19 (1923), the Supreme Court of Louisiana had refused a writ of certiorari to the State Court of Appeal "for the reason that the judgment is correct." Mr. Justice Holmes, speaking for a unanimous Court, said:

" . . . [U]nder the Constitution of the State the jurisdiction of the Supreme Court is discretionary . . . and although it was necessary for the petitioner to invoke that jurisdiction in order to make it certain that the case could go no farther, . . . when the jurisdiction was declined the Court of Appeal was shown to be the highest Court of the State in which a decision could be had. Another section of the article cited required the Supreme Court to give its reasons for refusing the writ, and therefore the fact that the reason happened to be an opinion upon the merits rather than some more technical con-

¹ Cf. *Western Union Telegraph Co. v. Priester*, 276 U. S. 252 (1928).

sideration, did not take from the refusal its ostensible character of declining jurisdiction. *Western Union Telegraph Co. v. Crovo*, 220 U. S. 364, 366. *Norfolk & Suburban Turnpike Co. v. Virginia*, 225 U. S. 264, 269. Of course the limit of time for applying to this Court was from the date when the writ of certiorari was refused." 263 U. S., at 20-21.

In *Lone Star Gas Co. v. Texas*, 304 U. S. 224 (1938), with the present Texas procedural provisions in effect, this Court's mandate issued to the Court of Civil Appeals in a case where the State Supreme Court had "refused" writ of error. See also *United Public Service Co. v. Texas*, 301 U. S. 667 (1937).

Accordingly the appeals in Nos. 199 and 201, from the Supreme Court of Texas, are dismissed. We proceed to consider Nos. 198 and 200.

The question presented is whether the Commerce Clause is infringed by a Texas tax on the occupation of "gathering gas," measured by the entire volume of gas "taken," as applied to an interstate natural gas pipeline company, where the taxable incidence is the taking of gas from the outlet of an independent gasoline plant within the State for the purpose of immediate interstate transmission. In relevant part the tax statute² provides that "In addition to all other licenses and taxes levied and assessed in the State of Texas, there is hereby levied upon every person engaged in gathering gas produced in this State, an occupation tax for the privilege of engaging in such business, at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered." Using a beggared definition of the term "gathering gas," the Act further provides that "In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted

² Tex. Laws 1951, c. 402, § XXIII.

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at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipeline, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant." It also prohibits the "gatherer" as therein defined from shifting the burden of the tax to the producer of the gas, and provides that the tax shall not be levied as to gas gathered for local consumption if declared unconstitutional as to that gathered for interstate transmission.

Michigan-Wisconsin Pipe Line Company and Panhandle Eastern Pipe Line Company, appellants, are Delaware corporations and are natural gas companies holding certificates of convenience and necessity under the Natural Gas Act of 1938 for the transportation and sale in interstate commerce of natural gas. The nature of their activities has been stipulated.

Michigan-Wisconsin has constructed a pipeline extending from Texas to Michigan and Wisconsin. At points in these two States and in Missouri and Iowa it sells gas to distribution companies which serve markets in those areas.³ It sells no gas in Texas. The company

³ The two appellants, through the distribution companies, supply gas for consumer markets with a population of about 12,000,000 people. As noted by the court below, "[E]xcept for minor variations Panhandle conducts its activities in the same manner as Michigan-Wisconsin. Panhandle loads its interstate pipeline with gas from the outlets of three gasoline plants, rather than with gas from only one plant; it produces a portion of the gas which it takes at the outlet of one of such plants; and it makes sales in Texas to three small customers, rather than sending all of its gas outside the State." We agree with that court that for purposes of this decision Panhandle's operations are not significantly different from those of Michigan-Wisconsin. Only the interstate aspects of the enterprise are in question. The operations of Michigan-Wisconsin, which transmits all

produces no gas; it purchases its supply from Phillips Petroleum Company in Texas, under a long-term contract. Phillips collects the gas from the wells and pipes it to a gasoline plant, where certain liquefiable hydrocarbons, oxygen, sulphur, hydrogen sulphide, dust and foreign substances are removed preparatory to the transmission of the residue. As this residue gas leaves the absorbers it flows through pipes owned by Phillips for a distance of 300 yards to the outlet of its gasoline plant, at the boundary between property of Phillips and property of Michigan-Wisconsin. Phillips has installed gas meters in its pipes at this point. The gas emerging from the outlet flows directly into two 26-inch pipelines of Michigan-Wisconsin. It is this "taking" that is made the taxable incidence of the statute. After the gas has been taken into the Michigan-Wisconsin pipes it flows a distance of approximately 1,215 feet to a compressor station owned and operated by Michigan-Wisconsin at which station the pressure of the gas is raised from about 200 pounds to some 975 pounds to facilitate movement to distant markets. In the course of its flow through this station the gas is compressed, cooled, scrubbed and dehydrated and then passes into a 24-inch pipeline which carries it 1.74 miles to the Oklahoma border and thence to markets outside Texas. Additional motive power is furnished by 15 other compressor stations in other states through which the gas is transported.

The entire movement of the gas, from producing wells through the Phillips gasoline plant and into the Michigan-Wisconsin pipeline to consumers outside Texas, is a steady and continuous flow. All of Michigan-Wis-

of its gas out of Texas, most clearly present the question to be decided and will be the basis of our discussion. This approach was utilized by the State court; and appellees do not suggest that the situations of the two appellants are different for purposes of decision here.

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consin's gas is purchased from Phillips for transportation to points outside Texas, and is in fact so transported.

Exclusive of the tax in question, Michigan-Wisconsin pays an ad valorem tax on the value of all its facilities and leases within the State. The State also levies on producers a tax of 5.72% of the value at the well of all gas produced in the State and a special tax to cover expenses in enforcing the conservation and proration laws.

The appellees place much emphasis upon the fact that Texas through these conservation and proration measures has afforded great benefits and protection to pipeline companies. It is beyond question that the enforcement of these laws has been not only in the public interest but to the commercial advantage of the industry. But, though this be an appealing truth, these benefits are relevant here only to show that essential requirements of due process have been met sufficiently to justify the imposition of *any* tax on the interstate activity. No challenge is made of the validity of the tax under the Due Process Clause, the appellants basing their objections only on the Commerce Clause, and when we proceed to examine the tax under the latter its validity "depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce." *Nippert v. Richmond*, 327 U. S. 416, 424 (1946). We proceed, therefore, to discuss only those relevant factors involved in the testing of the tax under the Commerce Clause.

The tax here assailed applies equally to gas moving in intrastate and interstate commerce. It is levied in addition to all other licenses and taxes and is denominated an occupation tax for the privilege of engaging in the "gathering of gas." Obviously appellants are not engaged in "gathering gas" within the meaning of that term in its ordinary usage; but the tax statute gives the term a

transcendent scope; as to appellants' operations it is defined as "the first taking . . . of possession of such gas for other processing or transmission . . . after such gas has passed through the outlet" of a gasoline plant. The State Appellate Court realistically found "the taxable event described by the statute" to be "the taking or retaining of the gas at the gasoline plant outlet" It thought that since this local activity was not subject to repetition elsewhere, "the sole question is whether such local activities are so closely related to and such an integral part of the interstate business of [appellants] who transport gas in interstate commerce as to be within the scope of the Commerce Clause of the Constitution." The court concluded that such taking "is just as local in nature as the production itself is local," and held the tax valid principally on the authority of *Utah Power & Light Co. v. Pfof*, 286 U. S. 165 (1932), and *Hope Natural Gas Co. v. Hall*, 274 U. S. 284 (1927).⁴

⁴ Appellees challenge at the outset of their argument this Court's jurisdiction to consider these appeals, on the ground that appellants present no question, federal or otherwise, for the Court's determination. The argument is in substance that appellants' grounds of protest in the State courts set forth a number of alleged operating incidences of the tax, none of which coincided with the operating incidence found by the Court of Civil Appeals; that the State court's finding on this subject is conclusive and binding on this Court; that appellants, in urging that the tax is a burden on and discriminatory against interstate commerce, are advancing new grounds not considered by the State courts and hence waived under the Texas protest statute; in short, that the issue of the validity of the tax was not properly raised. We think there is no substance to this contention. In their complaints and continuously thereafter appellants specifically challenged the validity of the tax statute under the Commerce Clause. The trial court held the tax invalid as violating the Commerce Clause. The Court of Civil Appeals expressly stated that the question for its decision was whether the statute as applied to appellants "violates the commerce clause of the Constitution of the United States. If so it is void, if not it is valid." Since the State courts have clearly

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We accept the State court's determination of the operating incidence of the tax, and we think the court has correctly stated the essential question presented. But we are unable to agree with its answer thereto or with its conclusion of constitutionality.

Appellants' business is the interstate transportation and sale of natural gas. Under the Commerce Clause interstate commerce and its instrumentalities are not totally immune from state taxation, absent action by Congress. Frequently it has been said that interstate business must pay its way, *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252, 259 (1919); *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 254 (1938); and the Court has done more than pay lip service to this idea. Numerous cases have upheld state levies where it is thought that the tax does not operate to discriminate against commerce or unduly burden it either directly or by the possibility of multiple taxation resulting from other taxes of the same sort being imposed by other states. The recurring problem is to resolve a conflict between the Constitution's mandate that trade between the states be permitted to flow freely without unnecessary obstruction from any source, and the state's rightful desire to require that interstate business bear its proper share of the costs of local government in return for benefits received. Some have thought that the wisest course would be for this Court to uphold all state taxes not patently discriminatory, and wait for Congress to adjust conflicts when and as it wished. But this view has not prevailed, and the Court has therefore been forced to decide in many varied factual situations whether the application of a given state tax to a given aspect of interstate activity violates the Com-

treated the single issue here presented as properly raised and preserved, and since appellees first suggested the contrary in their brief on argument in this Court, we think the objections to jurisdiction are not well taken.

merce Clause. It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it. *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 87 (1948); *Western Live Stock v. Bureau of Revenue*, *supra*, at 258. And if a genuine separation of the taxed local activity from the interstate process is impossible, it is more likely that other states through which the commerce passes or into which it flows can with equal right impose a similar levy on the goods, with the net effect of prejudicing or unduly burdening commerce.

The problem in this case is not whether the State could tax the actual gathering of all gas whether transmitted in interstate commerce or not, cf. *Hope Natural Gas Co. v. Hall*, *supra*, but whether here the State has delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun. Cf. *Utah Power & Light Co. v. Pfof*, *supra*. The incidence of the tax here at issue, as stated by the Texas appellate court, is appellants' "taking" of gas from Phillips' gasoline plant. This event, as stipulated, occurs after the gas has been produced, gathered and processed by others than appellants. The "taking" into appellants' pipelines is solely for interstate transmission and the gas at that time is not only actually committed to but is moving in interstate commerce. What Texas seeks to tax is, therefore, more than merely the loading of an interstate carrier which was condemned in *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 427 (1947), for the gas here simultaneously enters the pipeline carrier and moves on continuously to its outside market. "There is no break, no period of deliberation, but a steady flow ending as contemplated from the beginning beyond the state line." *United Fuel Gas Co.*

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v. *Hallanan*, 257 U. S. 277, 281 (1921). As early as *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 213 (1885), this Court said, "Receiving and landing passengers and freight is incident to their transportation." But receipt of the gas in the pipeline is more than its "taking"; from a practical standpoint it is its "taking off" in appellants' carrier into commerce; in reality the tax is, therefore, on the exit of the gas from the State. This economic process is inherently unsusceptible of division into a distinct local activity capable of forming the basis for the tax here imposed, on the one hand, and a separate movement in commerce, on the other. It is difficult to conceive of a factual situation where the incidence of taking or loading for transmission is more closely related to the transmission itself. This Court has held that much less integrated activity is "so closely related to interstate transportation as to be practically a part of it."⁵ We are therefore of the opinion that the taking of the gas here is essentially a part of interstate commerce itself.

The Court of Civil Appeals, as we have stated, relied largely on *Utah Power & Light Co. v. Pfof*, *supra*. But that case involved a license tax on the generation of electricity produced in a hydraulic power plant within the State of Idaho and transmitted to Utah. The question the Court was called upon to solve was whether "the generation of electrical energy, like manufacture or production generally, [is] a process essentially local in character and complete in itself; or is it so linked with the trans-

⁵ *Baltimore & Ohio S. W. R. Co. v. Burtch*, 263 U. S. 540, 544 (1924) ("loading or unloading of a shipment"); also see *Telegraph Co. v. Texas*, 105 U. S. 460, 466 (1881) (tax on "sending" of messages outside state is a regulation of interstate commerce); *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U. S. 90, 92 (1937) ("loading and discharge of cargoes" is interstate operation); *Richfield Oil Corp. v. State Board*, 329 U. S. 69, 83 (1946) (commerce begins "no later than the delivery of the oil into the vessel").

mission as to make it an inseparable part of a transaction in interstate commerce." The Court thought it inaccurate to say that the entire system was purely a transferring device. "On the contrary," it said, "the generator and the transmission lines perform different functions, with a result comparable, so far as the question here under consideration is concerned, to the manufacture of physical articles of trade and their subsequent shipment and transportation in commerce."⁶ Cited to support this principle was *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172 (1923), where a state tax levied on all "engaged in the business of mining or producing iron ore or other ores" was upheld since the "ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining" (at 179); and *Hope Natural Gas Co. v. Hall*, *supra*, which upheld a tax on "producers of natural gas reckoned according to the value of that commodity at the well." But the tax here is not levied on the capture or production of the gas, but rather on its taking into interstate commerce *after* production, gathering and processing.

The State Appellate Court recognized that nothing was done to the gas at the point of "taking"; its form was not changed in any way; it merely continued its journey. However, the court thought that it would be unfair to base a decision on the fluid nature of natural gas, and that there was in fact a two-step process, taking and transmission, with interference in between found in title passing and processing. But the processing, on which

⁶ 286 U. S., at 180-181. The Court found that in the operation there involved it was necessary to convert the mechanical energy into electrical energy before it could be transmitted and that this transformation was completed at the generator where the interstate movement began. This is analogous to the situation here where the gas is prepared by Phillips for transmission and is then fed into appellants' lines.

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this tax is *not* imposed, was done by Phillips and took place prior to the taxable event of "taking." As for the interference of title passing, appellees readily admit this levy was designed to avoid taxing the sale; and we think that, as a basis for finding a separate local activity, the incidence must be a more substantial economic factor than the movement of the gas from a local outlet of one owner into the connecting interstate pipeline of another. Such an aspect of interstate transportation cannot be "carve[d] out from what is an entire or integral economic process," *Nippert v. Richmond*, *supra*, at 423, by legislative whimsy and segregated as a basis for the tax. The separation must be realistic.⁷

Here it is perhaps sufficient that the privilege taxed, namely the taking of the gas, is not so separate and distinct from interstate transportation as to support the tax. But additional objection is present if the tax be upheld. It would "permit a multiple burden upon that commerce," *Joseph v. Carter & Weekes Stevedoring Co.*, *supra*, at 429, for if Texas may impose this "first taking" tax measured by the total volume of gas so taken, then Michigan and the other recipient states have at least equal right to tax the first taking or "unloading" from the pipeline of the same gas when it arrives for distribution. Oklahoma might then seek to tax the first taking

⁷ Appellees also rely on *Memphis Natural Gas Co. v. Stone*, *supra*; *Western Live Stock v. Bureau of Revenue*, *supra*; *Edelman v. Boeing Air Transport*, 289 U. S. 249 (1933); *Chassaniol v. Greenwood*, 291 U. S. 584 (1934); *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604 (1938). We think these cases are distinguishable from the present one in that in each of them the tax was imposed on a less integral part of the commerce process involved. Also distinguishable is *McGoldrick v. Berwind White Coal Mining Co.*, 309 U. S. 33 (1940), involving a tax on the sale of goods for consumption, imposed by the city in which the goods had come to rest. The Court there found that commerce, as to the goods, had ended prior to the taxable event, and likened the tax to an *ad valorem* one on property.

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of the gas as it crossed into that State. The net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate. "The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States." *McLeod v. Dilworth Co.*, 322 U. S. 327, 330-331 (1944).

Reversed.